United States Court of Appeals
for the Second Circuit

APPENDIX

76-7476

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United States Court of Appeals

For The Second Circuit

No. 76-7476

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellee,

against

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN, and ROBERT L. STERN as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
FEB 4 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX—TRIAL TRANSCRIPT

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NEWBURGER, LOEB & COMPANY

vs.

CHARLES GROSS, MABEL BLEICH and GROSS & COMPANY

71 Civ. 685

and

NEWBURGER, LOEB & COMPANY

June 25, 1975

Trial Resumed

(In open court - jury present)

THE COURT: Good morning.

ROBERT D. STEEFEL, called as a witness, being first duly sworn, testified as follows:

THE COURT: I take it you are examining on behalf of yourself and Mr. Shaw?

MR. SHAW: No, your Honor. In fact I believe at the end of yesterday's session I placed an objection on the record to this type of interruption of the churning matter. I object to proceeding in this fashion.

Do you remembar at the end of yesterday's rather taken up. I have especially agreed with counsel that I would make myself available this morning.

THE COURT: Let's go.

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q Are you an attorney by occupation?

A Yes, I am.

Q For what length of time have you been admitted to practice law in the State of New York?

A Fifty years.

Q Are you presently affiliated in active practice with any law firm?

A I am senior partner of the firm of Strooch & Lavan.

Q How large is the Strooch & Lavan law firm?

A The number of lawyers including partners and associates is in excess of eighty.

Q Were you affiliated with that law firm as a partner in the year 1970?

A I was.

Q For what length of time have you been affiliated with your present firm?

A Since I got out of law school fifty years ago.

Q Would you give us an outline of the salient points of your past academic and professional career since law school?

A Well, I have been a member of the Bar Association of New York and a member of the Thru-State Committee. I have been on the Mayor's Task Force for Better Children. I was on the Draft Board during World War II. I have been active in charitable affairs. I was general counsel of the Federation of Jewish Philanthropists for five years. I have been a trustee of the Montefiore Hospital for forty-five years. I am its executive vice-president.

I am a fellow of Brandeis University and without going into all this business I am connected with quite a good many charitable institutions.

Q Mr. Steefel, is there a particular area of the practice of the law with which you have been most closely affiliated?

A Real Estate.

Q Besides real estate do you also have any expertise in commercial or business transactions?

A I have been active in all kinds of business transactions during my whole career.

Q In the course of the half century that you have been at the Bar, prior to the year 1970, did you have any experience with brokerage houses?

A Occasionally, not frequently.

Q Did you have experience in liquidation problems?

A I must say that I do not recall having had experience in liquidating a brokerage firm before this one.

Q Did you have other experience with other kinds of businesses involving liquidation problems?

A Yes.

Q Over the fifty years that you have been at the Bar have you had occasion from time to time to deal with various facets and aspects of partnership problems?

A Continuous.

Q Would you say that that was something with which you had a close familiarity before 1970, sir?

A Yes.

Q In the year 1970 did you and your law firm become involved in the legal problems of an enterprise of a brokerage house called Newburger, Loeb & Company?

A Yes.

Q Who were the clients which Strooch & Lavan represented in that affair?

A The estate of Morris Newburger who was a deceased general partner. In fact, he was during his lifetime the principal partner.

Q Is that what is called the lead partner?

A He was the lead partner before his death.

Q At the time that you came into the Newburger, Loeb problem what was the status of the estate of Morris Newburger as related to Newburger, Loeb & Company among the categories of general partner, limited pa-tner or subordinated lender?

A Prior to his death he was general partner and if I recall the agreement correctly pursuant to the terms of the agreement upon his death his estate became a limited partner. I am going now by my memory.

Q Do you recollect what the amount of the capital standing of the credit of the estate of Morris Newburger was in the Newburger, Loeb & Company at the time --

A I don't recall but I know it was substantial.

Q Do you recollect whether there was any limited partner or general partner which had a larger interest than the estate of Morris Newburger deceased?

A My best memory is that he had the largest interest.

Q Do you recollect what the circumstances were of Newburger, Loeb at the time your firm was retained in this problem?

A I do remember it.

Q Would you tell us what you recall?

A I remember being called by some members of the firm saying that they were on the brink of being suspended by the stock exchange because their reserve we had shrunk up to the point where it did not meet the requirements of the New York Stock Exchange and they asked to consult with me to see what if anything could be done about it. I went to see an official of the New York Stock Exchange.

THE COURT: I think you answered the question, Mr. Steefel. You were asked what was the condition.

Q Faced with imminent suspension by the stock exchange --

THE COURT: You don't need to repeat the answer.

Q What did you do when you acquainted yourself with the problem as it faced Newburger, Loeb?

THE COURT: I think this should be restricted to the events of February 11th.

MR. GRUTMAN: There is a great deal more that has to do with good faith than just February 11th. It has to do with Mr. Gross' activity and the negotiations that went on and how the agreement came in to existence and the role Mr. Gross took.

THE COURT: I don't want to get into every conversation with the people in the stock exchange and phone calls with this one and that one.

MR. GRUTMAN: I propose to finish with this witness in thirty minutes.

MR. MANDEL: I wish to make it clear that to the extent that Mr. Grutman goes over any history leading up to the night of February 11th I am perfectly content for him to do so. I am going to reserve the right to cross examine fully on the same matters and I think they are important too. This is not going to be a quick brush-over by Mr. Grutman, your Honor.

THE COURT: I don't want any comments of this kind. I thought I was becoming increasingly clear as the days progressed. I also do not want to open up areas of inquiry just because counsel want to go over that ground.

I want areas of inquiry relevant to the issus in this complaint and we are into the second week of trial. Counsel may want areas opened up but I will permit them only to the extent that they are relevant and bear on the issues.

Please be guided accordingly.

Q Mr. Steefel, did you meet with someone at the stock exchange, yes or no?

A Yes.

Q Thereafter did you acquire copies of the financial statements of the position of Newburger, Loeb?

A Yes.

Q Did you examine those financial statements?

A Yes.

Q What was your view as to the financial viability of Newburger, Loeb at that time?

A Doubtful.

Q Thereafter were there meetings convened of representatives of the general partners, limited partners and subordinated lenders?

A Yes.

Q Were there a number of these such meetings?

A Yes.

Q Were people represented by counsel?

A Yes.

Q Do you recollect, Mr. Steefel whether or not there was any consideration given to a plan to reorganize Newburger, Loeb?

A Yes.

Q Was there a proposal to induce new capital into Newburger, Loeb?

A Yes.

Q How much was the new capital to be?

A My best recollection is $1 million but I am not sure.

Q In the proposed reorganization, Mr. Steefel, was the entity to remain a partnership or become some other lega form?

A It was to become a corporation, as I recall.

Q At these various meetings do you recollect whether or not the position of Charles Gross, a withdrawn general partner, and two withdrawn limited partners, Mable Bleich --

THE COURT: I sustain the objection on the grounds it is leading.

MR. MANDEL: It is also inaccurate.

MR. GRUTMAN: Very well, your Honor. I am trying to move along.

Q Was the interest of Mr. Gross represented at these meetings?

A On one or two occasions, I believe, but not at most of them.

Q In the course of the discussions did some format emerge which was satisfactory to the people who participated in these negotiations?

A Yes, a contract was entered into.

THE COURT: Sustained.

MR. MANDEL: I object.

THE COURT: I saw you rise. Sustained.

Q Did you have any discussions with Mr. Gross?

A On one or two or three occasions.

Q What did you say to him and what did he say to you?

A I would have to test my memory on this. My recollection is that he was speaking for his sister and another lady who had been limited partners of the firm who had withdrawn as limited partners and who demanded their money and demanded it to be paid forthwith and if they demanded payment of that money the reorganization plan could not go through because there was no money available to pay them and my recollection is that I urged Mr. Gross on behalf of his sister who I think was in Hawaii or some other place, to persuade her and the other lady to extend the time of payment of their claims so as to facilitate the reorganization.

Q Do you recollect anything else?

A I do not think so.

Q Do you recollect, Mr. Steefel, whether there was any discussion about litigation or any mention of it?

A Yes, I think I have some recollection and it is a little difficult for me to tie it together but Isaid to Mr. Gross that he asserted that he had certain claims against Newburger, Loeb and I told him that I had been informed by some of the partners of Newburger, Loeb that they had extensive claims against him and that if this matter was not settled and disposed of they would become involved in very extensive litigation over the years and I thought it advisable that there various disagreements be settled and the whole matter put on a sound business basis.

Q Did you try to facilitate that objective?

A Yes.

Q In the course of the conversation about the claims that existed you say various partners of Newburger, Loeb had told you of claims against Mr. Gross, is that correct?

A Yes.

Q Could you tell us the names of who these partners in Newburger, Loeb & Company were who had informed you of the existence of their claims against Mr. Gross?

A Well, I have got to tell you that I cannot say this with definiteness. I know that since I was talking very extensively with Robert Newburger and to some extent with Andrew Newburger, his brother, my best recollection is that it was with them but I would not want to swear to it that it was.

Q Who it was,Robert Newburger or Andrew Newburger or some other partner in the firm, I ask you whether it was such a person?

A It was one or the other of the partners of Newburger, Loeb.

Q Was it anybody from Finley, Kumble who said that to you?

A No.

Q In the negotiations was a committee of lawyers appointed to represent the limited partners?

A Yes.

Q Who were those lawyers?

A There was myself, there was Mr. Reichenthaul and there was a third gentlemen whose name I don't recall.

Q Was it Mr. Ronald Itzler of Balon, Stohl & Itzler?

A I don't think so.

Q Was it Daniel Eisenberg?

A Yes, I believe it was.

Q Did each of those people, yourself on behalf of the estate of Morris Newburger, Mr. Richenthal on behalf of somebody else and Mr. Eisenberg on behalf of somebody else represent people who were actually interested in the affairs of Newburger, Loeb financially?

A Yes.

Q Were there meetings in which this committee of three lawyers representing the limited partners met with representatives of the subordinated lenders and representatives of the general partners?

A Yes.

Q When went on briefly or in a descriptive overall way during the course of those meetings?

A May I suggest that going through all of this would be a waste of time --

MR. MANDEL: I am not objecting. The control of the scope of this examination is in the hands of your Honor. I am not objecting but going on record that I am respecting your Honor's request with regard to the scope of the examination.

MR. GRUTMAN: What is he doing if he is not objecting?

MR. MANDEL: We are going into matters which I will have to go into too. If it is to be curtailed I think it is up to your Honor.

THE COURT: You gentlemen put a burden upon me that is partially yours. I will ask you, Mr. Grutman, under what heading of any issue in this case this testimony is relevant?

MR. GRUTMAN: This testimony from this witness is intended to establish --

THE COURT: Tell me.

MR. GRUTMAN: The absence of a conspiracy, the openness and candor with which these negotiations were conducted and the good faith of the Finley, Kumble law firm.

THE COURT: Where is the conspiracy?

MR. GRUTMAN: The second counterclaim asserted on behalf of Gross, Bleich and Donohue by Mr. Mandel and I believe also the fourth counterclaim in the amended answer.

I am referring specifically to Paragraph 64.

THE COURT: I am looking at this.

MR. GRUTMAN: The fourth counterclaim, your Honor.

MR. MANDEL: Can we approach the side bar, your Honor?

THE COURT: Let me read this first.

MR. GRUTMAN: May I approach the witness? He is beckoning to me.

THE COURT: You may.

I will permit this testimony.

Q Over what length of time did the discussions go on before the night of February 11th?

A Months.

Q And over this period of time were there a number of meetings?

A Yes.

Q Were they what are called arm's length meetings?

A Yes.

Q Everybody represented by counsel?

A Yes.

Q Were there drafts of various memoranda and proposals circulated among counsel?

A I believe so.

Q Were there efforts made in the course of these meetings over the months that the negotiations went on to involve Mr. Gross and his claims in the meetings?

A There were, as I say, on one, two or three occasions.

Q What were you trying to accomplish in the meetings?

Q All the meetings which went on prior to February 11th.

A To reorganize Newburger, Loeb so it could survive.

Q If the reorganization had not taken place, Mr. Steefel, do you have an opinion as to what would have happened to Newburger, Loeb?

A We were informed by the stock exchange they would close it down.

Q And if the stock exchange had closed down Newburger, Loeb would there have been any money for the general partners?

A No.

MR. MANDEL: I object to that.

MR. GRUTMAN: We had this from Mr. Bialkin yesterday.

THE COURT: This is what his information was.

MR. MANDEL: From where, from what?

MR. GRUTMAN: Financial statements.

THE COURT: There was no objection to the question and his answer was responsive to the question.

MR. MANDEL: I didn't have time to get up.

THE COURT: Let us hear the question back.

(Question read)

MR. MANDEL: That question and answer I think have no foundation.

THE COURT: The last one?

MR. MANDEL: Yes.

THE COURT: I will allow you to cross examine on that.

Q If the stock exchange had closed down Newburger, Loeb would there have been any money for the limited partners in your opinion, Mr. Steefel?

MR. MANDEL: Same objection.

THE COURT: This is a question in his opinion?

MR. MANDEL: Yes.

THE COURT: Overruled.

A I think it is problematical. I don't think --

THE COURT: That is the answer.

Q How about the position of the subordinated lenders, do you have an opinion as to what would have happened to their claims in the event of the stock exchange closing down Newburger, Loeb?

A I am not certain.

Q On the night of February 11th was there what we lawyers call a closing which took place at the offices of

Finley, Kumble?

A Yes.

Q Did you attend at that closing in person on behalf of your client?

A Yes.

Q At that closing were there representatives --

A On behalf of my client and the three lawyers whom we referred to attended on behalf of the limited partners and general.

Q That is Mr. Eisenberg and Mr. Richenthaul?

A Yes.

Q Were there lawyers there on behalf of general partners?

A Yes.

Q And were general partners present?

A There were some there present, I don't recall which ones.

Q Do you recollect approximately how many different interests were there and represented by counsel?

A I think all the interests were there represented by counsel.

Q Does the number 17 lawyers and law firms ring a bell in your mind?

A No, but I know it was a large number.

Q Up to the night of February 11th of the various people who had been involved in these negotiations with the exception of Mr. Charles Gross who was a withdrawn partner --

THE COURT: Strike that question and start again. There is no foundation.

Q At the closing on February 11th was the transfer agreement presented for signature?

A Yes.

Q Did all of the general partners sign the transfer agreement?

A To the best of my recollection, yes.

Q With the exception of Mr. Gross' sister, Miss Donoghue, who was in Australia, and Miss Bleich, did all the other limited partners sign the transfer agreement?

A To the best of my recollection all of the limited partners signed the transfer agreement.

Q Weren't Miss Bleich and --

THE COURT: He answered that.

Q At the time of the transfer agreement did any limited partner, to your knowledge, not sign the transfer agreement?

A To the best of my knowledge there was no limited partner who did not sign the transfer agreement.

Q To the best of your knowledge what was the status of Bleich and Miss Donoghue at the time that the transfer agreement was signed?

A The information that I had received was that Bleich and Donoghue had withdrawn as limited partners and claimed to be creditors.

Q Did the subordinated lenders sign the transfer agreement?

A Yes.

Q All of them?

A I don't recall. It was either signed by them or on their behalf.

Q Had you seen the draft of the transfer agreement prior to the closing date of February 11th?

A Yes.

Q Did you know whether or not it was contemplated that an opinion would be delivered by the firm of Rosenman Colin Kaye Petschek Freund acting as special counsel in behalf of the partnership?

A Yes.

Q Had you been in touch with them before the closing itself?

A Yes.

Q Prior to the closing, Mr. Steefel, had you as one of the lawyers representing all the limited partners been advised that the Rosenman firm --

THE COURT: Let's not have leading please.

MR. GRUTMAN: This will not be a leading question

Q Had you been advised of what the position of the Rosenman firm would be concerning the giving of the opinion letter?

MR. GRUTMAN: Is that leading?

THE COURT: No, it's pretty close to it but not quite.

Go ahead.

Had you been advised of what their position would be, Mr. Steefel?

THE WITNESS: Mr. Max Freund, a partner of that firm had, to the best of my recollection, stated sometime shortly before the meeting that he was going to give the opinion in question.

Q That was before the meeting took place on February 11th?

A Yes.

Q On the night of February 11th when the actual meeting or closing took place was Mr. Freund in attendance?

A No.

Q In his sted or place was some other partner from the Rosenman firm appearing on behalf of the part[illegible]ship?

A There was a young man there and I haven't any idea whether he was a partner or not. I got the impression he was not a partner but I am not sure.

Q Whether partner or not was his name Paul Burak?

A I don't recall.

Q This Mr. Freund to whom you refer, is he a senior lawyer?

A He is a senior partner of the firm.

Q Approximately how old is Mr. Freund?

A Today?

Q Then.

THE COURT: Let's have today and we will do the subtracting.

THE WITNESS: In his young 60's.

Q You had known him before this particular transaction?

A For many years.

Q You had conversations before this transaction prior to the closing?

A Yes.

Q How short a time before the closing had Mr. Freund told you that he would deliver the opinion on behalf of the partnership?

A I don't recall.

Q Was it a matter of days?

A Yes.

Q Had Mr. Freund ever told you that he or his firm would do otherwise than what you just said?

THE COURT: We are getting into the leading here again.

Q What time did the closing start, the formality of the Finley, Kumble office on February 11th?

A As I recall it was an all-day affair and it went on late into the night, as I remember.

Q What time did you arrive on the premises of Finley, Kumble?

A I don't recall. I think it was in the morning.

Q Do you recollect at sometime or other this young lawyer, Mr. Burak advising that his firm would not furnish the opinion letter?

THE COURT: Please, Mr. Grutman --

MR. GRUTMAN: Is there any dispute about it?

THE COURT: I want to hear from this witness. I don't want your testimony. I want the witness to testify.

He was there not you. Why don't you ask him whether this young lawyer whose name he does not know, it is not Mr. Burak as far as you are concerned. it's somebody he does not know, that is something you injected into the question, you don't know his name.

THE WITNESS: I do not know the name.

THE COURT: You are there and there is a young lawyer and does he say anything about an opinion letter? What does he say?

THE WITNESS: He was asked whether he was furnishing the opinion letter which had been required as part of the contract. He said that he was not furnishing the opinion letter.

THE COURT: Did he say anything else?

THE WITNESS: He was pressed on the subject and I think I or somebody asked him where is Mr. Max Freund, why is he not here. The answer was he was not available to come nor was he available on the telephone. He said that he himself was not able to furnish the opinion letter.

It wasn't quite clear to me whether he meant by that that he was not authorized or whether he was not qualified to do so.

Q About what time of the day did Mr. Burak make this disclosure to you and the others present?

THE COURT: This young man.

Q This young man whose name you don't know but who was from the Rosenman firm.

A It was well into the meeting.

Q Prior to that time that he made the disclosure had there been any mention or reference of what his position would be on the opinion letter?

A No.

Q When this young man stated what he did say concerning the opinion letter what happened next?

A I and the other attorneys representing the limited partners said that we cannot close this transaction unless there is an opinion letter as to the validity of this transfer.

Q After you made that statement what is the next thing that happened about an opinion letter?

A Someone, and I cannot remember who, asked Mr. Persky whether he was prepared to give an opinion letter and it was pointed out that since he represented one of the parties it might not be appropriate for him to give an opinion letter.

It was then discussed among all the lawyers present whether or not we could appoint, all of the lawyers together could appoint Mr. Persky as special counsel to consider the facts and circumstances as to whether or not an opinion was appropriate and it was decided by all the lawyers present that it was appropriate for Mr. Persky to act independently of his relationship as counsel for the transferee and act solely in his own individual capacity and give some study to the opinion and see whether he could prepare an opinion in accordance with what had been required by the contract.

Q Did all of the lawyers present ask Mr. Persky to do that?

A Yes.

Q Did Mr. Persky then withdraw --

MR. MANDEL: Objection.

Q What did Mr. Persky do?

A Mr. Persky prepared an opinion letter.

Q Did he do that in your presence or somewhere else?

A No, he did it in some other room.

Q Do you recollect whether --

THE COURT: Mr. Mandel?

MR. MANDEL: I am standing so I can object.

THE COURT: You have done very well before by rising out of your chair. That is all you have to do and preferably announcing that you are objecting but I see you rising and your knees register an objection. Go ahead.

Q Do you recollect whether Mr. Persky drafted an opinion letter in the presence of all these other counsel who had asked him to do so?

A My recollection is that it was drafted in another room.

Q Did Mr. Persky have with him at the closing another lawyer from the Finley, Kumble firm?

A I do not remember.

Q Does the name Michael Bamberger sound familiar to you?

A Yes.

Q Do you recall whether or not Michael Bamberger--

A I remember him.

Q You remember Mr. Bamberger accompanying Mr. Persky when he left to draft the opinion letter?

A I do not.

Q How long a time did it take before Mr. Persky returned to the room where all the other lawyers were?

A It was not a long time. I would not venture to say but it was not a long time, maybe a half hour. I really don't recall.

Q When Mr. Persky returned did he have anything with him?

A Yes, he had a signed opinion letter.

Q Was it in final or draft form?

A I remember seeing it in final form. Whether it was a preliminary draft I don't remember.

Q When Mr. Persky returned with the draft how many copies did he have?

A You say the draft --

Q The opinion letter.

THE COURT: Let's ask when Mr. Persky returned with and whatever he returned with what did he do with it?

Q Whatever the document was that he authored, what was it and how many copies did he have?

A It was, as far as I recall, a signed opinion letter and I know that it was examined by every one of the attorneys present. Whether it was xeroxed or copied so that each one could read it separately, I am pretty sure it was because I know we all read it carefully.

Q I am going to ask you to tell the jury what the phrase opinion letter means.

A It means a lawyers legal judgment and decision with regard to a question of law.

MR. GRUTMAN: Until the other copy is found, may I offer the letter of February 11, 1971, deem it marked as a Finley, Kumble exhibit and replace it with a copy rather than to disturb the closing binder itself which contains a copy of the letter?

THE COURT: Do you have a copy of that?

MR. MANDEL: Yes, your Honor, and I do not object to this procedure.

THE COURT: Very well.

MR. GRUTMAN: Mr. Steefel has supplied us with a copy.

(Finley, Kumble Exhibit E received in evidence)

Q That document was circulated among all the lawyers?

A Yes.

Q Do you recollect whether the document which Mr. Persky brought back with him into the meeting room where you were all gathered was revised or changed in any way after it was submitted for circulation among the other counsel representing all and each of the other interests?

A I have no recollection of its being changed and my best recollection is that it was not changed.

MR. GRUTMAN: With your Honor's permission I would like to read this letter.

(Mr. Grutman read Finley, Kumble Exhibit E in evidence to the jury.)

MR. GRUTMAN: That is the opinion letter which Mr. Persky delivered, is that correct?

THE WITNESS: That is correct.

Q Mr. Steefel, was that opinion letter satisfactory to you?

A Yes.

Q Did you have your clients sign the transfer agreement?

A Yes.

Q Did you believe the opinion which Mr. Persky gave was correct?

A Yes.

MR. GRUTMAN: No further questions.

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Steefel, let's start with your conversation with Max Freund which you say occurred a few days before February 11, 1971.

How certain are you as to the time of that conversation? Could you be mistaken by a few weeks or a month?

A When was the contract signed?

Q February 11th was the date of the closing.

A When was the contract signed? That is the contract to close.

Q December 30th, I believe.

A There was intervening a month and a half. It certainly was in between that period and it could have been a few days before February 11th or it could have been a few weeks before February 11th.

Q Were you aware on the night of February 11th or had anybody told you on the night of February 11th that under a date of January 25, 1971 the Rosenman firm had a memorandum of law in which they stated flatly --

MR. GRUTMAN: Objection to the contents of a document not in evidence. That is an indirect way of accomplishing what clearly can't be done.

THE COURT: Let's take this one piece at a time. Was he aware of any memorandum of law from the Rosenman firm on this subject?

Q Dated February 5, 1971.

A I have no recollection. I don't know if I ever saw it.

Q Or heard of it?

A Right.

Q Up to this moment?

A Yes. I won't swear that I didn't but I have no independent recollection of it whatsoever.

Q Did Mr. Persky tell you at any time on the night of February 11th that he knew in advance, at least for several weeks, that the Rosenman firm believed that the agreement could not be validly authorized without the signatures of Bleich and Donoghue?

Did Persky ever tell you that?

A No.

Q Did Persky ever tell you that the day before he had had a quarrel with a man named Burak at Rosenman and that Burak was adamant and he said we believe those signatures are required and we will not sign an opinion letter without those signatures?

A No.

Q Did Mr. Persky tell you on February 11th or shortly before that, 1971, that Miss Bleich and Miss Donoghue were withdrawn partners?

A I don't think Mr. Persky told it to me. I think it was told to me both by Mr. Gross, maybe by you and by some of the general partners of Newburger, Loeb.

Q Do you distinguish, Mr. Steefel, between a giving of notice withdrawal and the effective date of that notice?

A I am only repeating words that were given to me which was that they had withdrawn as partners and demanded payment of their money as creditors. I don't know that I ever saw any paper or any notice. Maybe I did but I don't recall it.

Q Mr. Steefel, don't you recall that at a meeting or two which you and I attended together I said that --

MR. SHAW: Objection, your Honor. I object upon the ground of repeated interposition of Mr. Mandel as a character or actor in this case.

THE COURT: The witness brought up this point or statement that Mr. Mandel allegedly made to him and his recollection of what this statement was. I think this is permissible.

Objection overruled.

Q Don't you remember that I said to you at one of those meetings that as a withdrawn partner Gross had the status of creditor?

A Pardon me?

Q Gross had the status of the creditor. Do you recall my saying that or not?

A Possibly.

Q Do you recall my saying that Bleich and

Donoghue were still limited partners and that the agreement could not be put through without their consent under Article 98 or Section 98 of the partnership law?

A Frankly I don't think I had heard --

THE COURT: Do you remember?

THE WITNESS: I do not remember.

Q Do you remember attending any meeting, Mr. Steffel, at which the question of the impact of Section 98 of the partnership law was raised in connection with the proposed agreement?

A When you mention 98 as such I do not recall specifically Section 98. I do remember discussion prior to the signing of the contract which led up to the closing that it was necessary to have the consent. There was discussion that it was necessary to have the consent of all the general partners and limited partners to the transfer.

I don't remember specifically a reference to Section 98 by number.

Q Don't you remember that the opinion letter which you have just read raised the question of Section 98 in connection with Bleich and Donoghue?

A The opinion letter does not refer to Bleich and Donoghue.

Q Do you remember that Bleich and Donoghue did not in fact sign the opinion letter or rather the transfer agreement?

A That is correct.

Q Do you remember that they were not represented at the closing?

A My best recollection is that Mr. Gross was there purporting to represent them.

Q On February 11th, Mr. Steefel, is that your recollection?

A I am not sure.

Q Do you have any recollection at all about that?

A I had thought I remembered that Mr. Gross was there but I would not want to swear to it.

Q Mr. Gross could have been at some different and prior meeting?

A It's possible.

Q Will you accept my representation --

MR. GRUTMAN: Objection.

THE COURT: Sustained.

Q In the opinion letter which was read to you, Paragraph 3 says:

"We are informed that all the present,

general and limited partners of the partnership have executed the agreement except two limited partners who have submitted written notices of withdrawal of capital."

Now, did you have an understanding as to who the two limited partners were who did not sign?

A Yes.

Q Who were they?

A Bleich and Donoghue was the other name.

Q Was it your understanding that they were, having submitted notices, that they were no longer effective limited partners?

A Yes.

Q And that was the understanding upon which you accepted this opinion letter?

A That is correct.

Q And Mr. Persky never made it clear to you that the effective date of their withdrawal as limited partners was, say, June 30, 1971?

A Nobody made that clear.

Q That comes as a surprise to you as of this moment, sir.

MR. SHAW: Objection.

THE COURT: Sustained.

Q Were you then familiar with Section 98 of the partnership law?

A Was I then familiar with it?

Q Yes.

A In a general way.

Q Did you research it personally?

A Did I what?

Q Research the law personally.

A I did not.

Q You relied entirely upon Mr. Persky's opinion, did you not?

A Substantially, yes.

Q You assumed that Mr. Persky was an honest lawyer who was giving you all of the relevant facts, is that correct?

A Yes.

Q If you had been warned that the Rosenman firm had researched it and reached a contrary conclusion would that have affected your behavior?

MR. SHAW: Objection. That is not in evidence.

MR. ESTERMAN: Objection.

THE COURT: Mr. Steefel is going to return. He says he has another commitment, Mr. Mandel. Is this the least bad a time as any to terminate your examination?

MR. MANDEL: Yes.

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THE COURT: Two things, gentlemen, I assume, and nobody has indicated to the contrary, but I assume that nobody contends that the fact that a written notice of withdrawal of capital has been submitted in any way affects a person's status as a limited partner for purposes of Section 96?

MR. GRUTMAN: That is not our contention at all, just the contrary.

THE COURT: Was that contention raised before Judge Ward?

MR.GRUTMAN: It was not.

MR. MANDEL: If you look at the opinion and the briefs, I think it was raised before Judge Ward and I think there is no question about it and the decision --

THE COURT: Were there written notices of withdrawal of capital?

MR. GRUTMAN: Absolutely.

MR. MANDEL: December 30 or something like that.

THE COURT: Was the argument made before Judge Ward that this in any way affected the status of the limited partners?

MR. GRUTMAN: There was none and I will so represent.

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MR. MANDEL: One moment. I believe it was and I believe he specifically made the decision.

THE COURT: I will review it.

MR. GRUTMAN: I will recess and give you an affidavit or anything else because I think this is very critical and I want the Court to be advised.

MR. SHAW: The argument before Judge Ward was actually transcribed and we can make that available to you.

MR. MANDEL: There are extensive briefs.

THE COURT: Somebody without getting into any great endeavor can point out whether this matter was called to his attention and I would be prepared to listen to an argument promptly, obviously, as to whether written notice of withdrawal of capital affects a person's status as a limited partner.

MR. GRUTMAN: Yes, your Honor.

THE COURT: Next question.

I assume that you are going to call somebody from Rosenman, Colin --

MR. MANDEL: I have Burak's deposition, I have Burak and I have the memorandum.

THE COURT: With regard to the fact that that memorandum was in existence and that there had been a conversation between Mr. Burak and Mr. Persky on this subject. I think that given that, unless I hear a strong argument to the contrary, subject to connection I would permit you to ask this witness whether his view would have remained the same on the validity of this letter as a question of the legal opinion, the validity. Had he been aware of the Rosenman's firm position communicated to Mr. Persky.

MR. ESTERMAN: He was aware of the fact at the closing.

THE COURT: No, he is not aware of this memorandum.

MR. ESTERMAN: He is aware of the fact that they would not give an opinion.

THE COURT: He was aware --

MR. MANDEL: That there was a young man here.

THE COURT: He was not able to furnish the opinion letter and he wasn't quite clear as to whether Mr. Freund was not available either to come or not available on the phone.

MS. BJORK: There was a schedule of documents. The opinion by the Rosenman firm had always been a document which was contemplated and had to be given as is always in the case of any transaction of this sort. There was no question that the opinion everybody focused on and it was clear that they knew early in the closing that the Rosenman firm for some reason or other was not going to give one of the essential documents at the closing. Every lawyer at the meeting knew that.

THE COURT: I think the inquiry goes further than they were not going to give it.

MS. BJORK: Of course it does, the state of knowledge and the intricacies of the reason why the opinion wasn't going to be given is relevant but nevertheless every lawyer knew that they would not know that.

THE COURT: I appreciate that but in questioning this witness on behalf of Finley, Kumble who has support for your position that Mr. Persky was in good faith in this, it seems to me relevant to ascertain that this witness himself might have had a different view on the law because you have profferedhim. The closing question is were they agreed with Mr. Persky on the law not being aware of any contrary considerations. It seems to me it is relevant that there were some contrary considerations.

MR. GRUTMAN: If that is so it would be relevant.

MR. MANDEL: It is also our position that Persky in bad faith concealed from these lawyers the true state of the matter.

THE COURT: I appreciate that is your position and it seems to me all I want to do is ascertain that it can be demonstrated on this record, which just taking this subject to connection, that Mr. Persky was aware of this memorandum at some earlier time.

MR.GRUTMAN: I will dispute that. It is a proposition attempted to be proven.

THE COURT: Mr. Burak apparently says --

MR. MANDEL: I want to be careful here. Mr. Burak did not say, as I recall it, that he gave Persky the memorandum. He is not sure of that. He says he told him weeks in advance that their research went the other way. He said he had cases.

THE COURT: He told Mr. Persky he had cases?

MR. MANDEL: Yes.

THE COURT: Then that is the substance of the memorandum.

MR. ESTERMAN: That is disputed, your Honor.

MR. SHAW: That is not correct and it is unfair.

MR. MANDEL: One other thing that is important.

THE COURT: Let us take our recess and somebody give me the deposition on that subject and I will read it.

MR. GRUTMAN: Can we also research the state of the record to what was before Judge Ward on this proposition about the withdrawal notices served by these two recalcitrant spoilers?

THE COURT: The thing I am puzzled about is when I ruled on this earlier and said to the entire courtroom and both you and Mr. Shaw were here at that point I said the record is no different before Judge Ward than before me that these people had not withdraw as limited partners. Everybody agreed with my pronouncement that they had not withdrawn.

MR. ROTHMAN: I have their brief right here raising that subject.

Page 23, the limited partners --

THE COURT: Which brief?

MR. ROTHMAN: Our adversary's brief. Joint answering memorandum submitted on behalf of plaintiff and additional defendants in answer to the gross defendant's motion for summary judgment.

MR. SHAW: This is the memorandum before Judge Ward.

MR. ROTHMAN: The limited partners (the term as used herein is intended to mean the actual limited partners in the partnership as of February 11th, 1971 and those such as defendants

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Bleich and Donoghue who had served notice of withdrawal prior thereto but still had a money claim against the partnership) represented $2,147,865 in invested capital in the partnership including the investments made by Bleich and Donoghue. That is page 23. Then on page 33 and 34 they say these were the considerations that resulted in all the subordinated lenders, nine of the eleven limited partners and all the actual limited partners as of December 31, '70 and their able counsel accepting and approving the transfer agreement as fair. This is in the statement of facts.

Under the argument Subtitle A, the transfer agreement was authorized and proper and not in violation of Section 98 of the Partnership Law, they state.

With respect to Bleich and Donoghue they had given their notices of withdrawal as of December 31, 1970. The transfer agreement was executed of course on February 11, 1971. After October 1 gross only interest in the partnership was the right to receive payment of money 12 months hence pursuant to the formula computation set forth in said partnership agreement. With respect to Bleich and Donoghue after December 31, 1970 their right was also limited to obtaining the payment of a sum of money pursuant to formula computation six months thereafter. The corporation specifically assumed these liabilities.

THECOURT: Obviously the point was raised.

MS. BJORK: I doubt it was argued.

MR. SHAW: The argument was basically the Churning claim.

THE COURT: Briefs argue as well as do mouths.

We will take our recess.

MR. MANDEL: Wait, your Honor. This is so obvious. Jusge Ward said Bleich and Donoghue however retained their status as limited partners for six months from the day of their notices of withdrawal pursuant to Section 7.7(b) of the partnership articles. Why do I have to have ulcers over something like this?

THE COURT: May I see the partnership articles?

MR. MANDEL: This is Judge Ward's decision.

MR. GLATZER Since the Section 98 section coming up will your Honor be deciding some of the summary judgments made with regard to the first counterclaim on Section 98 itself?

Judge Ward's decision did not say who was responsible even if there was responsibility.

THE COURT: That is a problem I am going to grapple very shortly.

MR. MANDEL: One other thing, your Honor.

Bleich and Donoghue were the last limited partners to give notice so that all the limited partners were out if they were out.

THE COURT: All the other limited partners had previously given notice and were signatories of the agreement?

MR.MANDEL: Yes.

THE COURT: All right.

We will take from the lawyer's point of view six or seven minutes. The jury has been ouy for 15 already.

(Recess)

(In open court; jury present.)

MR. SHAW: The plaintiff calls Charles Jordon to the stand.

CHARLES R. JORDON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

THE COURT: Mr. Shaw and Mr. Mandel, we have Mr. Marcus returning at 2. Should somebody call him? I think we get to the point where if we break up every witness as we go along we then are going to start having problems.

MR. SHAW: I was anticipating we would proceed with Mr. Jordon and since we have been interrupting previous witnesses that at 2 o'clock in view of the fact that Mr. Marcus is an attorney that we would interrupt Mr. Jordon and beginning where we had left off with Mr. Marcus. I don't imagine that the examination of Mr. Marcus that Mr. Mandel is in the process has too much more to go. I have just a few questions to ask Mr. Marcus.

MR. MANDEL: I object. I think we should finish with Mr. Jordon.

THE COURT: I am a little distressed that we have one piece here and another piece there of another one.

MR. MANDEL: We are getting too many chopped up witnesses.

THE COURT: We will take Mr. Marcus at 2 or whenever you come back after lunch on the representation he is going to be not too long and we will finish him.

Go ahead.

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Jordon, how are you employed presently?

A I am a registered representative of Shearson, Hayden, Stone.

Q How long have you been a representative at that firm?

A Since February of this year.

Q Prior to February of this year how had you been employed?

A Would you like to go through my entire history of employment?

Q Just please tell me how you were employed prior to February of this year.

A Prior to February of this year I was with Thomson, McKinnon, Auchincloss & Kohlmeyer.

Q As a registered representative?

A Yes.

Q How long had you been with that firm?

A I had been with that firm from October 1973.

Q How were you employed prior to October of '73?

A I was the registered representative with Kohlmeyer & Company.

Q How long had you been with Kohlmeyer & Company?

A I had been with Kohlmeyer & Company from May, approximately 1972.

Q How long had you been withKohlmeyer & Company?

A From October 1972 until -- from May 1972 until October '73, when we were merged with Thomson, McKinnon and it became Thomson, McKinnon, Auchincloss & Kohlmeyer.

Q Before you were employed by Kohlmeyer & Company where had you been employed?

A With Weis, Voisin Securities.

Q When did you begin working at Weis, Voisin?

A I began working with WEis, Voisin Securities in the year 1971 when Scheinman, Hochstin & Trotter were merged with Weis, Voisin.

Q When did you go to work with Sheinman, Hochstin?

A January 1969.

Q Prior to January 1969 were you a partner in Gross & Company?

A Yes, sir.

Q Is that the Gross & Company which is one of the defendants in this case?

A Yes, sir.

Q Do you know Charles Gross?

A Yes, sir.

Q Do you know Mrs. Bleich?

A Yes, sir.

Q Mr. Gross and Mrs. Bleich had both been your partners, correct?

A Yes, sir.

Q Were you a general partner in this firm?

A Yes, sir.

Q How long had you been a general partner of Gross

& Company?

A From February '62 until the end of 1968.

Q Is Mr. Mandel the attorney for Gross & Company?

A I think so, yes.

Q Has he represented you in the course of the depositions taken in this case?

A He has represented me as a partner of Gross & Company.

Q Has he generally represented you with respect to business matters at Gross & Company?

A He has only represented me as a partner of Gross and Company in this particular case.

Q Had you given a statement to Mr. Mandel about the facts of this case?

A Yes, I gave an affidavit to Mr. Mandel.

Q Two weeks ago?

A No. I gave an affidavit to Mr. Mandel I think it was in the spring of '71.

Q In addition to giving an affidavit to Mr. Mandel did you sit down with Mr. Mandel and with a stenographer present give a statement or answer questions with respect to the facts of this case?

A At a deposition.

Q In addition to being present at a deposition did you also sit down with Mr. Mandel where no other attorney was present from the other side and give him a statement of the facts of this case, to your knowledge?

A Yes, when I gave him my affidavit.

Q Was that some time in early 1971 when this case began?

A It could have been early in '71 or late in '71 when I gave him the affidavit.

Q I am not referring to the affidavit, sir. I am referring to a statement about the facts of the case.

MR. MANDEL: You mean a written statement?

MR. SHAW: Any type of statement other than an affidavit where you were giving answers and he was writing down something.

A Outside of the affidavit?

Q Yes.

A It seems to me these questions are a little premature. We are here to elicit facts with respect to the matters in the complaint.

MR. SHAW: I am trying to do this in order to obtain a certain latitude.

THE COURT: Why don't you go along and determine whether there is an appropriateness to these questions which I don't see yet. I think we should get down to the facts.

Q Have you had more than one meeting with Mr. Mandel to discuss the facts of this case?

A Yes.

Q Approximately how many times have you met with Mr. Mandel to discuss the facts of this case?

THE COURT: In my discretion I am going to sustain objections to this.

Let us go to the facts alleged in these pleadings, please. If there comes a basis for this kind of question we will consider it at that time.

Q Were you a partner of Gross & Company in charge of the account of David and Mary Buciley during the period 1962 through L966?

A I was, sir.

Q Did you from time to time have conversations with Mr. Gross with respect to your handling of the facts of Gross & Company?

A No, sir.

Q Did you ever advise Mr. Gross as to what you were doing with respect to the accounts that you were handling?

A No, sir.

Q Did he ever ask you what activity or what was going on at any of the accounts that you handled?

A No, sir.

Q Where was Mr. Gross' desk in relation to your desk when you were employed by Gross & Company? Was it nearby or was it distant?

A It was, I would say, nearby.

Q How close?

A Oh, say, 30 feet. Mr. Gross had a private office.

Q And did you discover the telephone with Mr. Buckley various purchases and sales of securities?

A Yes, sir.

Q Was it possible for those in the office during the period 1962 through 1966 to overhear these conversations you were having with Mr. Buckley?

A I doubt it very much, sir.

Q When had you first met Mr. Buckley?

A It was some time in 1959.

Q At that point were you connected with another brokerage firm?

A I was with Hayden, Stone at the time.

Q You were with Goodkind, Neufeld & Jordon?

A At the time I was with Goodkind, Neufeld & Jordon from February '61 to '62 February.

Q Was Mr. Buckley an account of yours when you were with Hayden. Stone?

A Yes, sir.

Q Was he an account of yours when you were with the Goodkind firm?

A I wuld think that he was, sir.

Q When you left the Goodkind firm you went with Gross & Company, correct?

A That is correct.

Q Was Mr. Buckley's account an active account when you were with Hayden, STone?

A I would say it was a fairly active account.

Q By that what do you mean? How active was the account when you were at Hayden, Stone?

A I have absolutely no recollection as to how active it was.

Q Can you recall that while the account was at Hyaden,Stone there was a profit or a loss in the account?

A I would think there would have been a profit.

Q Can you recall how high the profit was?

A I have absolutely no idea whatsoever.

Q Can you recall how many transactions per day or per week or per month there were?

A I have no recollection?

Q Isn't it in fact true however that the volume of the transactions in the Buckley account while you were with Hayden, Stone was less than the volume of the transactions when you were with Gross & Company?

A That could have been.

Q When you met Mr. Buckley can you recall approximately how old he was at the time?

A I daresay he must have been around the 30 area.

Q Can you recall that in 1962 he was approximately 31 so that when you first met him he was in his 20s?

A That could have been.

Q When you met Mr. Buckley for the first time did he advise you about his employment and his family and his background?

A When he opened the account he had to advise me of his employment.

Q Because he gave you information which you used to fill out an accout card, correct?

A That is correct.

Q When the account was transferred to Gross & Company was an account card filled out?

A Yes, sir.

Q And did the account card set forth in the information that you obtained from Mr. Buckley regarding his circumstances, his age, employment, family?

A Yes, all the necessary details required by

Newburger, Loeb.

Q Does the account card set forth all those necessary details?

A All the necessary details that were set forth on the card were answered per se by Mr. Buckley.

Q What year was it you say that you first met Mr. Buckley?

A 1959.

Q At that point did he tell you how he was employed?

A Yes, he told me he was employed with Lever Brothers.

Q Did he tell you what salary he was earning?

A Well, I think he had to state that on the new account form.

Q Do you recall that he advised you at that point that his salary was in the range of approximately $15,000 per year?

A Yes, I think I recall that.

Q Do you recall Mr. Buckley also advising you that in addition to there being a Mrs. Buckley there were two children?

A Well, at some time at that time or in the future after that I found out that he had either two or several children.

Q During the course of the period 1972 through 1966 did you also learn that from the point of two children there subsequently came a time when there were five children?

A In fact, I thought there may have been more, five, yes.

Q Prior to the time the account was transferred to Gross & Company, the account of Mary Buckley, did you learn anything further with respect to the circumstances of the Buckleys and the children?

A I don't know as far as the timing is concerned, I don't know exactly. I know some time in the '60s he did mention to me that he and his family were receiving some stock from his dad.

Q Georgia-Pacific?

A That is correct.

Q In the amount of approximately $5,000 worth of stock each year for each person?

A He never mentioned any specific amount except he told me he had quite a bit of Georgia-Pacific stock.

Q In addition to learning these circumstances that we have thus far gone over, including the Georgia Pacific stock, during the period 1972 did you make any effort to learn anything further about Mr. Buckley or his circumstances or that of his wife or his children?

A I didn't have to inquire because he volunteered certain information.

Q I am not concerned with how you learned, just what did you learn, sir? What did you learn in addition to what you told us?

A I learned his father was very wealthy and that he had been receiving promotions as time was going on and that there were times when he told me he expected to be a very wealthy man and he felt he wanted to make it on his own.

Q Did he tell you anything further?

A Yes, some time in the '60s he told me that he had a carry forward loss from his previous activities in other brokerage houses and that he wanted to makeup those carry forward losses. He had a period of five years in which to make them up.

Q Again regarding his circumstances did he tell you anything further?

A I recall him saying that if I was wondering why he was trading so actively and he said the reason he was trading so actively was the fact that he had nothing to worry about in the future of his entire lifetime because of the fact that he was well taken care of in the future by his father's wealth and by his father's gifts to him and his family.

Q Did he tell you anything further regarding his circumstances, that of his wife and his children during this period?

A The circumstances as to what?

Q Information that might be relevant to the account card, his income,his assets, that of his children. Did he tell you anything further regarding the circumstances that you would want to know as the customers man handling the account of David and Mary Buckley?

A Not that I can recollect except what I told you previously.

Q Can you recall being advised by Mr. Buckley in substance that his salary went up from a rate of about $15,000 a year at the beginning ofthe time that you knew him or in the early period to the rate of approximately $30,000 per year towards the end of that period of time?

A He kept telling me as to his promotions that he was getting.

Q And you understand that he was a man who was employed by Lever Brothers earning a salary of between 15 to $30,000 a year?

A Approximately during that period, yes.

Q Did you ever have any conversation with Mr. Buckley when you opened up or transferred the account to Gross & Company with respect tohsi investment objectives?

A Dave Buckley told me that he was interested in making money, short term trades or long term trades, against rather, but he was interested in making money because he would like to make it on his own and also that he had this carry forward loss to make up at the same time.

Q Did he mention to you the size of the carry forward loss?

A Well, the figures that remain in my mind may be a little far-fetched but I thought he stated as much as a half million dollars at one time.

Q You are not sure about that?

A I am not sure about it but that is the figure that sticks in my mind.

Q By the way, during the period that you were with Gross & Company were you what is considered an active producer or a big producer?

A I was considered a fairly large producer.

Q By that is meant, is it not, the fact that you had about 100 to 150 accounts?

A I don't recollect exactly how many accounts I had. It could have been 100 to 150.

Q Is it possible in some instances you are confusing the statements made to you by one account with the statements made to you by another account?

A No, sir.

Q Isn't it in fact true that when customers open up accounts they generally indicate to you that they are doing this because of the desire to make a lot of money?

A Well, I think that is the objective of everyone who trades the market.

Q Did Mr. Buckley, as you sit here and recall, every advise you that the money that he was investing was emanating from the Georgia-Pacific stock, in part at least?

A Not in so many words except that he had deposited Georgia-Pacific stock in his account.

Q Did you understand that the source of the moneys were Georgia-Pacific stock, at least in part?

A I don't know. I just stated that the only way I know that is that he had deposited Georgia-Pacific stock in his account.

Q In what quantities?

A I have no recollection.

Q Were the quantities large like 25, $30,000 a year? That is in substance or around that range.

A I have no recollection. I don't think it was that high but I have no recollection.

Q Did you understand that a portion of the moneys being deposited in the account came from Georgia-Pacific stock?

A Partly, yes.

Q Did you understand that a portion of the money is in the account with Georgia-Pacific stock given by Mr. Buckley to his father?

A At that particular time I didn't know he got it from his father.

Q Did a time come thatyou learned that?

A I learned he had received stock from his father.

Q You learned also that his wife and the five children had received Georgia-Pacific stock?

A Yes, sir.

Q And it was this money that was being used in the account, correct, at least in part?

A I don't know. I know his children's stock was never put up in the firm. His children's stock were kept in trust at the bank, he told me.

Q Did Mr. Buckley ever advise you in words or in substance "I want to take risks, I want to speculate, I am not concerned with anything more than taking risks and speculating"?

A He was a very aggressive speculator. He was never interested in income, dividends in any way. He was interested in making money.

Q Mr. Jordon, did Mr. Buckley ever advise you in substance "I want to take risks, I want to speculate"?

MR. MANDEL: I object on the ground that it's been asked and answered.

MR. SHAW: It hasn't been answered and I move the answer be stricken as unresponsive. I am asking for a conversation.

THE COURT: Do you remember him saying anything like that to you?

THE WITNESS: Yes.

Q When did he tell you that?

A It was some time after he opened the account.

Q What were his words?

A I have no recollection of his exact wording.

Q Did he tell you in substance that what he wanted to do was take risks and to speculate with the moneys being obtained through the sale of Georgia-Pacific stock given by his father to himself, his wife and his children?

A Not per se, as I said before, was the fact that he had no worry about his future and that he wanted to speculate and he wanted to trade, to make money, to make it on his own and also to make up his carry forward loss which he had told me that he had.

Q Isn't it in fact true that Mr. Buckley advised you that going into 1962 he had a tax carry forward loss of approximately $11,000?

A I don't know what carry forward loss he had. All I know is what carry forward loss he told me he had.

Q Is it your recollection as you sit here today that he told you that he has a $500,000 tax loss carry forward?

A Form some reason or anotehr that amount sticks in my mind.

Q Mr. Jordon, does it stick in your mind that a time came when there was a tax loss carry forward on the part of Mr. Buckley and Mary Buckley and that this tax loss carry forward arose some time in the year 1966 by virtue of his losses in Westec and his deficit on his margin account with Gross & Company cleared through Newburger, Loeb?

A No, sir, what sticks in my mind is the fact that he had a profit of close to three or four hundred thousand dollars of Syntex that would have made up a great portion or maybe all of his carry forward loss. I advised him to sell it and he refused.

Q When you advised Mr. Buckley to sell Syntex did he have a paper profit at that point?

A He had quite a large paper profit and I suggested that he sell the stock.

Q Is it your testimoney that he told you at that point that he had a tax loss carry forward of approximately $500,000 some time in 1964 or 1965?

A He didn'ttell me in 1964 or '65.

Q When did he tell you that he had a tax loss carry forward?

A It was some time in the '60s. I guess it could have been 1972 or thereabouts, '61. I don't recollect the exact time he told me that.

Q What is your present recollection as to what he said?

A He told me that he had a carry forward loss.

Q Yes.

A And the figure that sticks in my mind for some reason or another was that half million dollars.

Q Did he tell you how he had lost a half million dollars?

A No, sir, he hadn't lost it through me. He lost it he said in his other brokerage account.

Q Did you ask him how he had done it?

A No, sir.

Q How many times did you actually meet with Mr. Buckley in person?

A Oh, I met with Mr. Buckley quite often in person. He used to come up to my office during lunch.

Q Was that during the period you were with Goodkind, Neufeld & Jordon?

A That was the period when I was with Hayden, Stone. His office was across the street.

Q Midtown New York?

A Yes, sir.

Q But in 1962 you joined Gross & Company, correct?

A Thatis correct.

Q And their offices were downtown New York?

A Yes, sir.

Q Is it fair to say that from 1962 on you used to see Mr. Buckley in person frequently?

A Much less often than I had seen him at Hayden, Stone.

Q Would he still come to your office when you were downtown and he was midtown at Lever Brothers?

A Very, very, very seldom.

Q Although you saw Mr. Buckley a lot less in person commencing in 1962 is it fair to say that commencing in 1962 Mr. Buckley did a lot more business through you than he had prior to 1962

A I don't recollect if he had done a lot more business. I knoe he had done business with me in 1962.

Q Commencing in 1962 were you in frequent telephonic communication with Mr. Buckley?

A I was in communication with Mr. Buckley and Mr. Buckley was in communication with me.

Q Returning your calls?

A No, calling.

Q How many times a day would you call Mr. Buckley?

A That is hard to say. It varied. It could have been twice a day, three times a day, four times a day.

Q 6, 7, 9?

Did you ever call him as much as 6, 7, 9 or ten times per day?

A I doubt it very much.

Q Did you ever call him six, seven to nine or ten times a day every day of the week during any of these years 1972 through 1966?

A Never.

Q With respect to the number of transactions that Mr. Buckley was involved in and Mary Buckley was involved in through Gross & Company, do you have any recollection as to the number of transactions which you initiated? In other words, which were upon your recommendation as opposed to any other reason.

A That is a very difficult thing to say.

Q Would it be fair to say that between80 and 90 percent of the transactions were as a result of your initiation and suggestion and recommendation to Mr. Buckley?

A Definitely not.

Q What percentage would you say it is, sir?

A It could have been 60, 65, 40, 50. I have no recollection. There were as many suggestions coming from Mr. Buckley as came from me.

Q Would you say it could have been 65 percent?

A I would think that would be on the high side.

Q What would you say would be on the low side?

A That is a very difficult question to answer. It could have been even 30 percent.

Q Did you ever analyze the Buckley ledge account to try to count up how many transactions were in the account and which transactions resulted from your recommendation as opposed to which transactions were not the result of your recommendation?

A No, I never did that.

Q As you are sitting here you are just giving us a estimate or a feel that you have?

A I think I am giving you a fair estimate of what I think went on.

Q When was the last time you saw any ledger card or account card setting forth the transactions in the accounts of either David or Mary Buckley?

A There was no account card. That was on the statements.

Q Let us call the statements. When was the last time you saw any of those statements back in 1966 or 1969?

A We used to get our duplicate copies from Newburger, Loeb.

Q Are you saying you haven't seen those statements since 1969?

A I haven't seen those statements since 1966.

Q And you never have gone over those statements with Mr. Mandel or with Mr. Gross in preparation for this trial?

A No, sir.

Q Would it be correct to say that during the year 1962 when the Buckleys' accounts were at Gross & Company clearing through Newburger, Loeb that the activity in the account was fairly light as opposed, for example, to the activity in the account in the years 1964 and '65 and '66?

A It probably was because --

Q It was, correct?

MR. MANDEL: Please.

MR. SHAW: I don't want an explanation.

THE COURT: I will strike the answer then because the answer is a guess on his part.

Q Mr. Jordon, I direct your attention to a blow-up of what is Exhibit 49 in this case and ask you whether this document accords with your recollection with respect to the activity in the Buckley accounts wherein you were the customer's man employed or as a partner of Gross & Company?

MR. MANDEL: I object to that. There is no foundation. The witness has never seen the document and I doubt if he can read it from there.

THE COURT: Let's see what his answer is.

A Would you repeat your question.

(Question read.)

A Yes, the activity increased. As you see in the equity line there the second quarter of '62 shows an equity of $12,000. The third quarter of '62 shows an equity of $63,000 approximately, $62,000 approximately. Dave Buckley --

MR.SHAW: There is an answer to the question.

The witness is just speaking. Thank you.

Q The equity increased and the activity increased, correct?

A As the equity in-reased Dave Buckley being a very aggressive speculator --

MR. SHAW: I move to strike. There is no question outstanding.

THE COURT: Strike it out.

Q During the year 1962 did you have any conversation with Mr. Buckley where he used the word aggressive speculation?

A Dave Buckley told me, as I said before, that he was interested in making money on his own even though he knew that he never had any worries as far as money for the rest of his life and that he was always interested in making money and trading and using the leverage available to him.

Q Did he tell you at any time in 1962 or 1966 that he and his wife and his children and his family had so much money that they weren't concerned with losing it or not, is that what you are telling us?

THE COURT: I sustain the objection to the form of that question.

MR.SHAW: I am sorry, your Honor.

Q Is it your recollection that Mr. Buckley gave you the impression during this period that losing money was no concern to him since he had so much of it?

A I don't think anybody enjoys losing money no matter how much money they have.

Q But did he tell you that it was a matter of relatively small concern to him and his wife and his children?

A I don't remember the words specifically but I recall him telling me that he had a lot of Georgia-Pacific stock in the vault.

Q And not to worry about it?

A And he would never seem to be worried, no, sir.

Q Did he also tell you not to worry?

A I worried about all my accounts, sir.

Q In the year 1972 did Mr. Buckley indicate to you other than you have indicated to us what his assets and his liabilities were?

A Specifically, no.

Q I ask you the same question during the entire period 1972 through 1966, did he ever sit down with you and did you ever ask him what his assets and liabilities were?

A Specifically I didn't think I had the right to pry into his private affairs as to the specific assets of he or anyone of his family.

Q You didn't ask?

A I didn't have to ask, in most cases he volunteered.

Q Did you ask him what his assets and liabilities were during this entire period, at any time?

A No, sir.

Q When did Mr. Buckley open up a margin account?

A I have no recollection.

Q Didn't he have a margin account all during this period?

A I don't know whether it was all during this period.

Q Substantially?

A Substantially, yes. He may have had it all during the period.

Q Does a margin account represent moneys borrowed from Newburger, Loeb in order to finance the purchase of stock?

A Thatis correct, sir.

Q And did the debit balances in this margin account at times go as high as a quarter of a million dollars?

A Yes, I think they did.

Q And did you ever inquire of David Buckley during this period as to how he or his wife or his children or his family could pay the debit balances if the stocks proved worthless?

A It was never in the back of my mind that any stocks bought for him were worthless.

Q Mr. Jordon, would you from time to time call Mr. Buckley up and tell him that in your opinion he should purchase certain named stocks?

A I would from time to time suggest the purchase or sale of securities at one time or another, yes.

Q And he would in many instances follow your recommendations?

A In some instances he would follow my recommendations and in some instances, many instances, he would not follow my recommendations.

Q I believe that you would purchase stocks and sell stocks all during this period, correct?

MR. MANDEL: Objection.

THE COURT: Sustained as to form.

Q Did you give recommendations to Mr. Buckley and have conversations with him all during this period about the buying and selling and the trading of stocks?

A As I say, I would call him on the average of maybe three, four times a day. He wouldcall me on the average of the same time. Maybe I would all him one day more than he would call me. The other day he would call me more tan I would call him.

Q Is it also fair to say thatin large part the stocks or the positions in the stock were held for short periods of time? In other words, there was frequent activity, in and out, in and out?

MR. MANDEL: Objection to the form.

(Sustained.)

Q There was activity in the account, correct?

A I would say there was activity i [illegible]he account.

Q Does that chart 49 indicate the activity in the last column captioned Turn Over Ratio?

A I see the turn over ration but I never looked into what turnover ration Mr. Buckley had. Those figures may be true or false. I don't know.

Q Is it your recollecton that there was a frequent turning over and reinvestment of capital in Mr. Buckley's account?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q Did you advise Mr. Buckley at any time during this period that he should turnover his capital?

A No, sir.

Q Is ityour testimony that he told you something about what he wanted to do in the turning over of his capital?

A As I told you beforehe was very interested in trading and making money because he was interested in making money as fast as he could and he wanted to make it on his own.

Q Did he tell you that he wanted to turn over his capitol directly?

A He never mentioned anything about turning over capitol.

Q How long have you been a customer's man?

A Since 1936.

Q Have you heard the word turn over ratio during that period of time?

A I have heard theword turnover ratio.

Q Have you heard that certain guidelines exist at any time with respect to turnover ratios?

A I can't --

Q You never heard that?

THE COURT: Let him answer.

Q You never heard about that?

THE COURT: Let him answer.

Q Do you believe that there are --

MR. MANDEL: Let him answer the question.

A I never heard guidelines as to turnover of capital.

Q Do you believe there are any guidelines?

A There might be.

Q Have you ever computed the sum of money that you earned as commissions on the David and Mary Buckley accounts during the period '62 through1966?

A Never, sir.

Q Does the figure $75,000 during this period seem correct?

A I have absolutely no idea whether 5,000, 50,000, 75,000. I have absolutely no idea what the commissions amounted to.

Q Do you have any recollection with respect to what portion of your income during this period was earned through the Buckley accounts?

A Absolutely none whatsoever.

Q Upon your recommendation did Mr. Buckley deal in calls?

A Not that I recall, no, sir.

Q Have you had any conversation with Mr. Mandel or Mr. Gross during the past several days about calls in the Buckley account?

A Yes, I did, sir.

Q But you have no recollection regarding calls in the Buckley account, correct?

THE COURT: That is not what he said.

MR. SHAW: I will rephrase the question, your Honor.

Q Will you tell us what your understanding of a call is?

A Yes. Purchasing a call is purchasing a option on a stock at a set price for a given period of time.

Q Is a call purchased from a person?

A A call is purchased -- in those days a call was purchased usually from a put and call house.

Q Does the put and call house act as a broker in some instances?

A Not that I recall. The put and call has to be signed by the brokerage house in order to be able to be sold. It has to be -- what is the exact word?

MR. GRUTMAN: Endorsed.

Q Isn't the other side of a call a put?

A The opposite of a call is a put.

Q Where there is a call is there a person making a put?

A Not necessarily. It may be selling the call naked.

Q In some instances there is a person on the other side of the transaction wherein a call is purchaed, a person is selling a call, in substance?

A That is correct.

Q On any occasion in the account of the customers thatyou represented were you on the other side of their purchase of a call?

A Was I at any time selling the call to Mr. Buckley?

Q Any customer.

A No, sir.

Q Is that the question that Mr. Mandel asked you during the last several days?

THE COURT: I will sustain an objection on the grounds of form.

Q Mr. Jordon, do you have any transactions wherein you are personally involved in the stocks or callsbeing purchased or sold by Mr. Buckley during the period '62 to '64?

MR. MANDEL: I object to the form.

THE COURT: Sustained as to form.

Q Other than simply earning a commission as a broker were you in any way involved, to your knowledge, in any of these transactions that Mary and David Buckley were involved in during this period?

MR. MANDEL: I object to the form.

THE COURT: Sustained.

If you gentlemen are puzzling about what I mean by my ruling which is obvious from reading your lips, the answer is the word involved. If you want to ask him whether there was any of his stock sold or purchased any that Mr. Buckley sold, let us go to it. Involved means he was on the phone, he talked to people, he made a deal, arranged for a sale. Involved means 5,000 things.

Q I think you understnad the question.

THE COURT: I think he doesn't understand the question. I sustained the objection. Please put a proper question.

Q Would any of these calls or stocks that were purchased by Mr. Buckley your stocks or your calls?

A They were never my calls.

Q Howabout the stocks?

A In what relation do you mean that?

Q When you were recommending that Mr. Buckley buy stock were you recommending at any time during this period that Mr. Buckley buy stocks in which you had a position?

A Not in stocks I had a position in. I always advised Mr. Buckley when I recommended a stock to him, I advised him before I bought the stock. And if he had purchased the stock then I made the purchase of the stock.

Q Is it your present recollection that you had a position in the stocks that you were recommending Mr. Buckley purchased but you told him of your position if you had a recollection?

A I recall one specifically, yes.

Q Westec, right?

A Syntex, sir.

Q Did you ever advise Mr. Buckley that you and members of your family had a position in Westec when you were recommending that he purchase Westec?

A No, sir, I called Mr. Buckley to buy Westec before I bought the stock. I told him I was going to buy it and I told him I wanted to buy it for him first.

Q You told Mr. Buckley that you were buying Westec, correct?

A I advised him --

THE COURT: We have an answer to the question. Put another question.

Q What did you advise him?

THE COURT: He told you.

A I suggested the purchase of Westec to David Buckley.

Q Did you ever advise Mr. Buckley that you were continuing to make purchases of Westec?

A I was advising Mr. Buckley that I was continuing to make purchases and sales of Westec.

Q When did you first so advise Mr. Buckley?

A It was after he had purchased the stock.

Q Was that in 1965?

A I think it was, sir.

Q What else did you advise Mr. Buckley about your purchases of Westec, if anything?

A I don't understand your question per se.

THE COURT: Put it again, please.

Q What else did you advise Mr. Buckley about your purchases --

THE COURT: Put it differently, Mr. Shaw. I don't understand it either.

Q Did you advise Mr. Buckley that a time came when you and members of your family owned about 10,000 to 11,000 shares of Westec stock?

A Yes, I remember telling him I owned a fairly large position in the stock and that I was trading around that position.

Q Did you use the number 10 or 11,000 shares?

A It could have been.

Q Is that your recollection?

A To the best of my recollection I may have told him that.

Q How many shares did you and members of your family own in Westec when trading in the stock was suspended?

A 6,000 shares.

Q What was the highest number of shares that you and members of your family owned?

A I would say somewhere between 10 and 12,000 shares.

Q When did you own those 10 or 12,000 shares?

A Oh, sometime in 1975 and '66. As I said before, I was trading around that position.

Q You mean you were selling your shares which at one time were 10 or 11,000 shares and reducing your holdings to around 6,000 shares?

A Much to my regret.

Q When did you begin selling Westec?

A I had been trading Westec and then I began selling Westeck short against the box, oh, somewhere in the 20s, low 20s to high 20.

Q When did you begin selling Westec short against the box?

A In the middle 20s, low 20s to the high 20.

Q Was that some time in late 1965?

A Yes, sir.

Q When you sell stock short against the box do you make a profit when the stock declines in value?

A No, you are losing money because you still have your position. I didn't sell all my shares. I still had a fairly large position in Westec.

Q I am not talking about short sales as a hedge. Assuming you have no long position in the stock when you sell short against the box do you make money when the stock goes down?

A When you are selling short against the box you have a long position in the stock already.

Q When you sell short do you make money when the stock goes down?

A When you are actually shorting the stock?

Q Yes.

A Yes, sir.

Q Did you ever advise David Buckley that he should sell short Westec?

A I don't recollect whether I did or not.

Q Did you ever advise David Buckley that you were shorting the stock Westec?

A I think I did.

Q When?

A When I was selling short against the box.

Q All during 1965?

A There are times in '65 when I was trading around the position without selling short against the box, sometimes taking profits, sometimes taking losses.

Q You sold the stock short on more than one occasion?

A I did, sir.

Q In fact you had a continual short position, didn't you, for a substantial period of time, for a number of months?

A I was never actually short the stock.

Q You were selling short.

A I was selling short the stock against the box in 1965, that is correct, sir.

Q Were you selling short Westec stock against the box in 1966?

A In 1966 I may certain short sales against the box.

THE COURT: What does this mean, againastthe box, for the jury's benefit?

THE WITNESS: I was long say 10 to 12,000 shares of Westec and I didn't want to take the actual profit say for that particular year, 1965.

THE COURT: Long means you own the stock?

THE WITNESS: That is correct, at lower prices. When you sell short against the box what you are actually doing is you can defer the income or the gain from one year to antoehr and also if it may go down a bit you could buy it back and cover your position that way and you make a short term trade at any future year or so.

Q Is that a form of hedge?

A To a certain extent it would be a form of hedge.

Q So if the stock goes down an awful lot you are not hurt an awful lot, your loss is minimized?

A I guess you can say that.

Q Did you ever recommend to David Buckley that he should hedge in this fashion?

A I don't recollect. I may have.

Q Did you ever advise David Buckley that you were hedging in this fashion with respect to Westec?

A I never advised Mr. Buckley that I was hedging in this fashion. I was advising Mr. Buckley that I was selling short against the box. But for hedging purposes.

Q Can you estimate the number of times you advised Mr. Buckley that you were doing this?

A That is a difficult question to answer.

Q Was it a subject of repeated conversations between you and Mr. Buckley?

A I don't recollect how many times. It could have been months, three times, I don't know how many times I told him.

MR. MANDEL: May we approach the bench?

THE COURT: We are going to recess for lunch at this point. We will recess until ten minutes after two.

(Jury left the courtroom.)

MR. SHAW: You want Mr. Jordon not to talk to anybody?

MR. SHAW: Yes.

THE COURT: All right.

MR. MANDEL: Maybe he shouldn't even hear this.

THE COURT: You are excused for now and don't talk about your testimony to anybody.

MR. MANDEL: I would like this to be on the record. I think my adversaries are trying to turn a churning case into some different kind of case entirely, a case without merit but one which has not been pleaded and one which has not been prepared and one which is not before the Court. I have allowed a substantial amount of latitude about this and it seems to me that not one word

CROSS EXAMINATION (Continued)

BY MR. MANDEL:

Q Mr. Marcus, we were talking about capital turnover rate and guidelines. I asked you if you have any references with regard to industry literature which establishes capital turnover rates for particular situations and yesterday all you could mention, as I recall it, was Exhibit M. Have you since then searched for our found or obtained any other references establishing guidelines?

A If by industry references you mean writings of this nature used by people in the industry as tools or what have you the answer to that would be no.

Q How about SEC documents, does the Securities and Exchange Commission have any documents which establish guidelines for capital turnover in controlled accounts?

MR. SHAW: Objection to the use of the words controlled accounts. What does that mean? Is that adding another element to this case?

THE COURT: I don't know. Let us see what the answer is.

A Again, in terms of SEC pronouncements on turnover rates in general there are various cases but I don't know specifically of any written memoranda that they have put out. I assume there are internal memoranda of the commission.

Q What cases of the SEC do you know about that establish maximum capital turnover rates of two? None, right?

MR. SHAW: Objection. The witness is not being given a chance to answer the question.

THE COURT: Let's see what happens.

A There are cases that I hve read in the past which turn on specific fact situations. They don't say this is permissible or this is not permissible. They look at the turnover rate in the given case and make a determination as to whether it was appropriate or not under the circumstances.

MR. MANDEL: I move to strike. The question was if he had any case where a mzimum of 2 was established.

THE COURT: Strike it out.

Q Will you answer my question.

A The answer is no because the cases don't speak in those terms.

THE COURT: His answer is no.

Q Do you have a case where a maximum of 3 was established?

MR. GRUTMAN: I can't see how that is a proper question. If the cases don't speak in those terms --

THE COURT: I think it is a proper question.

This gentleman is here as an expert and he is an attorney and he has testified to certian guidelines and there was exploration in his testimony in that regard.

Overruled.

A The cases --

MR. GRUTMAN: The previous answer established that the cases don't speak in that framework. If they don't speak in that framework as to the --

THE COURT: I struck that part out because it was not responsive.

MR. GRUTMAN: All right.

A There are cases where a turnover rate of three times in a year has been held to be excessive.

Q What case?

A I would need time to refer to certain documents to refer to this.

Q Was that a discretionary account?

A Either discretion was found in any such cases.

Q What is the case, do you know?

MR SHAW: Is that the name of the decision?

Q You say you can find it. How long would it take ?

A Through reference to certain articles that exist on the subject.

Q But you don't know them now?

A Not out of my mind, no.

Q What is the highest rate of turnover that has been sustained that you know of?

MR. SHAW: Objection to the form of the question. It is unclear, your Honor.

THE COURT: Yes, it is to me too.

Q Do you know of any cases that have been sustained by Capital to turnover ratio of higher than 5?

A Offhand I can't say that I do know of any such cases.

Q You don't know whether such cases exist or not?

A Where a turnover ratio of 5 was found acceptable, no, I do not.

Q How about 6?

A The cases with which I am generally familiar were the ones where ratios were found excessive rather than acceptable. However -- all right. I will let that answer stand.

Q What is the maximum permissible turnover ratio in a case where the client makes all the decisions?

A First of all, even where control has been found the client may make the decisions. Are you talking about where the client has initiated as opposed to just approved the recommendation of the salesman?

Q Can you answer the question which I asked you?

A No, I cannot, not as posed.

MR. SHAW: Objection, your Honor.

Q What is the maximum capital, maximum permitted capital of turnover ratio where the client makes the decisions rather than the registered representative where there is no control, let's put it that way?

MR. SHAW: Objection.

THE COURT: Overruled.

A That question still can't be answered as asked because all the other factors enter into it. The turnover ratio does not stand in a vacuum, it ties in with the other surrounding facts.

THE COURT: What facts do we need? Mr. Mandel is positive that there is no control by the representative and that the client is the one who calls him and says I want to buy. Do you need more than that?

THE WITNESS: Well, on those facts you wuld still certainly want to know someof the other factors with respect to the client himself although typically in those cases churning has not been found. I think the practice in the industry is nevertheless to look at those cases and ascertain with respect to the client whether or not control exists.

But where the customer in fact makes all of his own decisions on his own, to my knowledge, assuming he has initiated as opposed to following recommendations of the salesman, in those cases with which I am familiar churning has not been found in that type of situation.

Q My question is what is the maximum permissible capital turnover rate in those situations?

A What I am saying is to my knowledge none has been set on those facts whereas you are positing ~~it~~ the customer has initiated all the recommendations himself.

Q In other words, the customer is entitled to speculate and turn over capital as much as he likes if he knows what he is doing and he is the one who is doing it, is that correct?

A The problem with what is if he knows what he is doing. That is what the brokerage firm has to determine.

Q You are responsible for compliance of these rules in your firm, are you not?

A Yes.

Q And you have many employees?

A Yes.

Q Have you issued any directives rather to those employees to help them avoid churning situations?

Q After you have an adive account what do you do?

A Then itis analyzed among other things for turnover ratio, the commissions generated are looked at, we make certain other inquiries with respect to the nature of the customer and the circumstances to see whether taking the whole situation in its entirety based on the factors that have previously been discussed here whether it appears to us that it might be a churning situation. We also talk to the customer to see that he understands what is going on in the account and ti is in accord with his wishes.

Q So you have personally examined a large number or a substantial number of accounts that were discretionary and active and you have determined the turnover ratio of those accounts, right?

A Again, I don't do that review personally.

Q But you are responsible for it?

A In part.

Q And you give the instructions, right?

A In part. There is another gentleman who reviews discretionary accounts.

Q Is there any one account where you have ever said on this account it is gone to a capital ratio turnover of 2 and that is churning, by God, has that every happened?

MR.SHAW: Objection.

THE COURT: Take out by God and you may answer the question.

Q Has that ever happened?

A There have been cases where we have decided or determined that accounts are too active and that the sales person and the client should be talked to to reduce the activity.

Q I am talking about turnover ratios of 2. You say that is took active per se in a non-discretionary act.

MR.GRUTMAN: That is not his testimony in this case.

MR. MANDEL: Buckley's account was a non-discretionary account.

I ask you what you do in your discretionary accounts.

MR. GRUTMAN: I object to the question since it presupposes an inadequate set of criteria on which the witness based his prior testimony. A nose is not a face.

A No, the 2 is not a per se excessive amount.

Q Even in a discretionary account, right?

A I would say that is true under the right circumstances, an account which knows and is willing to sustain such activity and also if the activity does not appear to be favoring the broker or the firm rather than the customer it would be acceptable. The problem again is you continue to focus on turnover ratio as the indicia of churning and there is a lot more to it as I discussed earlier in my testimony. You have to look at the trading in its entirety and the pattern of in and out.

MR. MANDEL: I move to strike everything except the answer to my question.

A Yes.

Q Mr. Marcus, the hypothesis give to you yesterday is that you had an educated customer, is that right?

A He had a college degree, yes.

Q A master's degree?

A All right.

Q In business. He had a course in securities analysis.

MR. SHAW: That wasn't in the hypothetical.

THE COURT: It was not, as a matter of fact.

MR. MANDEL: All right. We will let that go.

THE COURT: All I am saying is I don't think it was in a hypothetical.

Q That the customer has taken a special postgraduate course in security analysis.

MR. SHAW: There is no testimony to that effect. It was a postgraduate course in business and he had a BA in economics. There is no testimony supporting that.

MR. GRUTMAN: 1 three hour course.

MR. MANDEL: I will withdraw it.

MR.SHAW: Unless I am totally mistaken.

MR. GRUTMAN: You are not mistaken.

THE COURT: You have to go ahead on your own. In any event, the jury's recollection of the testimony will goven.

Q I ask you further to take into consideration that the customer approved every transaction in advance, got the confirmation slips regularly,got the statements regularly, kept his own stock records, understood everything that was happening, prepared his own tax returns, had large paper profits at times, wanted to speculate, wanted to use every device of leverage, was not satisfied when he had profits of $400,000 in one security, that he had outside friends in the industry, that he spent $100 a month for one financial publication and studied it, that for years he was keeping his records and knew what was going on and continued to authorize what was going on and never complained, taking those facts into your hypothesis, do you say a capital ratio of turnover of 2 per annum is excessive? Answer my question, please.

MR. SHAW: This is an improper tactic. The witness is trying to answer the question.

THE COURT: Everybody please be quiet so the witness can answer the question.

A Am I to take only the facts you are given or add it to the prior hypothetical?

THE COURT: Take those facts.

MR. SHAW: There is no basis then for the question. It is their ledger card and all the other facts.

THE COURT: No, Mr. Mandel is putting his hypothetical just as you put yours. Overruled.

MR.SHAW: I object upon the grounds of relevancy.

THE COURT: Overruled.

A I am going to have to have the question read because I misunderstood your beginning.

(Question read.)

MR. SHAW: I repeat my objection. This is unclear whether this is in addition to the facts taken in the original hypothesis.

THE COURT: It is clear it wasn't. We reread plus the education because you raised the question whether the course had been in security analysis. The question was sustained and we deleted that. Please go back and read it all over again.

To stand up and make an objection like that before the witness answers -- I want to make sure we have no question about it.

MR. GRUTMAN: I would like to make my objection beforethe reporter reads the back. On this naked question standing alone we don't have the description of the age or the financial circumstances.

THE COURT: You may add that just as Mr. Mandel may add or subtract from yours.

MR. GRUTMAN: Splendid, Judge.

(Question read.)

A Again I stated before certain elements that I would consider in deciding whether that was or was not excessive have not been included there so I really can't make a determination on the facts you have given.

In other words, I think the facts as stated are not complete enough on which to formulate an opinion and answer that question.

Q The facts stated to you yesterday were complete enough for you to formulate an opinion without these facts being cramped in, is that what you are saying?

A Some of these facts were in the question yesterday.

Q But you were able to formulate an opinion on what was told to you yesterday, you are not able to formulate an opinion on what I tell you now, is that correct?

A Yes, because the question does not include certain essentials.

Q That is all right. You can't formulate the opinion on these facts.

Do you keep computer records of your firm's accounts?

A They are generated on a computer basis, yes.

Q Do you have a way of finding out the average turnover ratio of all the accounts?

MR. SHAW: Objection. He answered that question before negatively.

THE COURT: Overruled.

A Not a computerized basis. Such calculations are made manually.

Q Do you have any knowledge of the average turnover ratio in your firm of all accounts?

A No, I already said we don't keep records on that basis.

Q Do you have any feeling at all?

A Only what I can answer from looking at accounts on a general basis. If you want my impression based on that

I can give you that.

Q I am asking you this now, sir: Do you have knowledge of the capital turnover ratios of Drexal Burnham where you are the compliance officer so that you can say with any degree of certainty what the average capital ratio turnover is in the accounts?

A I can only answer that on an impression obtained from looking at accojnts in general but not from making turn-analyses on all accounts or even on most accounts. If you want my impression based just on a review of accounts, just looking at monthly statements over the course of the period of time I can give you that.

Q Have you looked at monthly statements to determine the capital turnover ratio of the accounts?

THE COURT: Have you or haven't you?

THE WITNESS: I am not sure I can answer that question as posed.

Q You can't answer the question as posedd. Didn't you tell me before that you do not make that analysis except under special circumstances?

A Yes, that was part of my answer to that question and why I can't answer it as it was phrased.

Q You can't answer it. You don't know. You don't take the trouble to find out.

A I didn't say that.

MR. SHAW: Objection.

THE COURT: Sustained.

Q I would like to do one more thing, Mr. Marcus, in making your calculations of capital turnover how did you treat the purchase and sale of a stock pursuant to a call option?

A The sales were not calculated. This is only total purchase.

Q Just the purchase.

A The premium was included initially as a purchase and then the call price, if the call is exercised, the cost of the stock upon the exercise of the call was also included.

Q Was treated as a capital transaction?

A As a purchase, yes.

Q Mr. Rothman, will you mind going to the board again so we can illustrate one final example.

MR. SHAW: I would like that blackboard -- are you going to erase that?

MR. MANDEL: You want it kept?

MR. SHAW: Perhaps we can write it down on a piece of paper. I think it would be relevant to using it later on.

THE COURT: Wasn't it recited into the record? I was going to ask him to do that but as he was reading the figure it appeared to me the whole matter had been recited into the record.

MR. GRUTMAN: It has.

THE COURT: You can erase it as far as I can see.

MR. SHAW: May a copy be marked?

MR. MANDEL: I would like to offer it eventually or offer it to my friends to you can erase that.

Q Mr. Marcus, we are just going to go through a simple transaction.

THE COURT: Mr. Mandel, start your question without the preamble, please.

MR. GRUTMAN: Otherthan for rhetorical purposes is there any special reason we have to have this chalk illustration?

THE COURT: You have blowups of your exhibits.

MR. GRUTMAN: And they are in evidence.

THE COURT: I am going to permit this.

MR. GRUTMAN: All right.

Q Let us assume that Mr. Buckley wanted to buy or spend $10,000 to by calls on say Atlantic Richfield, the option being to buy at 100 and let us assume that the call price is what would be reasonable, ten, is that a good round number?

A Yes, that would -e a reasonable figure.

Q Ten?

A Yes.

Q That would be a leverage device, right, which was actually used in the account, right?

A Yes. There were calls purchased in the account.

Q So for $10,000he got the option to buy 1,000 shares of Atlantic Richfield at 100, is that correct?

A That is correct.

Q So far it is a typical kind of call, right?

A Yes.

Q Then just before the call expires the price of Atlantic Richfield --

A I think there is something wrong with the figures. Wait a minute. He is spending a total of $10,000?

Q Right.

A No, it calls on 1,000 shares, that would really be ten calls times 100 so that would be $1,000.

Q You are talking about a call as a unit of 100. I am only talking about shares. I am trying to make this simple so we can all understand it.

A He is spending only $1,000 on the calls for 1,000 shares, not $10,000.

Q Look again and think about it. It is $10 per share per call, right. The right to call one share costs him $10.

A Okay.

Q Right?

A Right.

Q So when he puts up $10,000 he has the right to call 1,000 shares at $1000 a share.

A Correct.

Q And if the price of the stock near the expiration date is 105 he has got to do something about that, right?

A Yes.

Q Let us assume that he decides to exercise, save this $5 per share by exercising and selling simultaneously, would that be a typical transaction?

A It certainly is one way to take the profit at that moment in a call.

Q It is a loss really but you salvage it.

A Okay.

Q So that typically he could buy, exercise his option to buy 1,000 shares at 100 and simultaneously sell those shares for 105, right?

A Yes.

Q And that is a typical transaction?

A Yes, that is done in the market, certainly.

Q And it was done in Buckley's account, was it not, where he exercised a call and sold and bought at the same moment, right?

A Yes, that was done in some cases in the Buckley account.

Q Were you hear when Buckley testified about that?

A No, I don't think I heard him testify on that.

Q The buying and selling simultaneously doesn't take cash in or out of the account, it is really a churning transaction so he can get the $5,000 back, right?

A Yes.

Q When you recorded this kind of transaction what kind of capital turnover ratio did you emerge with?

A That would be a turnover for that transaction --

Q 11 times, I think.

A No. On that particular transaction he would have invested 110,000 total purchase price with 10,000 capital, on that particular transaction.

Q You say it is a turnover of 11 times, right?

A On that transaction, yes.

Q That is artificial and meaningless, isn't it, that number applied to that situation?

MR. SHAW: Objection.

THE COURT: Overruled.

A No, it is not.

Q It is not?

A No.

Q Do you know about clearing houses and originating houses?

A To some extent, yes.

Q Who has the responsibility or let me put it another way, does the clearing house have the responsibility to prevent churning?

A Usually such responsibilities are defined in the clearing agreement as to who is responsible.

Q Isn't it true, Mr. Marcus, that under the rules of the Exchange and the security laws of the United States there is no way in the world that the clearing house can delegate that responsibility and absolve itself from responsibility?

MR. GRUTMAN: Objection. What the laws of the United States are and what they require is a function of this Court and not of any witness.

MR. MANDEL: As he understands it.

MR. GRUTMAN: I don't care what his understanding is.

THE COURT: That is a matter for you to show me the law and me to charge the jury if you are correct.

MR. MANDEL: This witness may know.

MR. SHAW: That is beyond his area of expertise. That is a question of general law.

THE COURT: Sustained.

Q Mr. Marcus, are you being paid or have you been paid for your testimony here as an expert?

MR. GRUTMAN: Nobody is paying for his testimony. The insinuation is foul.

THE COURT: You are objecting to the form of the question, right?

MR. GRUTMAN: Yes, sir.

THE COURT: Sustained as to form.

Q Are you being paid for your services here as an expert?

A I am not personally being paid for my appearance here. My firm will be reimbursed for its expenses in connection with providing myself and the services related.

Q Who is paying your firm?

A The Finley --

MR.SHAW: Objection.

THE COURT: Overruled.

Q Who is paying your firm?

A The Finley, Kumble firm.

MR. MANDEL: Thank you.

THE COURT: If I may ask you concerning this $10,000 of calls for Atlantic Richfield, that is a situation, is it not, in which the customer finds that by completing the transaction he can save himself a $5,000 loss, right?

THE WITNESS: Yes.

THE COURT: He has laid out 10,000 and finds he can save himself five of those ten by buying and immediately selling the stock, am I right?

THE WITNESS: That is right.

THE COURT: He saves himself $5,000 by going through this buy-sell transaction?

THE WITNESS: Yes.

THE COURT: In what way do you say that that is a turnover of his capital 11 times when he saves himself $5,000?

THE WITNESS: The mathematical calculation would be to add the $10,000 cost for the calls and the $100,000 purchase price in exercising the calls so that adds up to $110,000 and assuming the $10,000 is the only capital in the account you would divide that by the $10,000 in the account.

THE COURT: So this is a bookkeeping thing and has nothing to do with capital actually put in or taken out.

THE WITNESS: It is a mathematical calculation.

THE COURT: He doesn't put in and take out 105, it is a bookkeeping calculation. He has a total transaction in which he saves himself $5,000.

THE WITNESS: Right, on these facts. That is the net effect of it.

THE COURT: Thank you very much.

If this apparently has some support in the record for the fact that this has occurred in this case --

THE WITNESS: I don't know as far as the numbers or the magnitude but there were cases where calls were exercised and sold out contemporaneously.

THE COURT: This is the salvage operation as it is called in the trade as I understand?

THE WITNESS: This is one way to salvage some of it.

THE COURT: Obviously that 11 times figure gets averaged into all the other figures on your Exhibit 49?

THE WITNESS: Yes, it would.

THE COURT: That is a factor that the jury must keep in mind in assessing Exhibit 49, are we correct in that?

THE WITNESS: It is a factor.

THE COURT: That is the way I phrased my question, yes.

Thank you very much.

REDIRECT EXAMINATION

BY MR. SHAW:

Q Is it customary in computing ratio of turnover capital, of the turning over of capital, to include transactions such as this?

A Yes.

Q What is the basis for including such a transaction in computing the turnover ratio?

A Well, twofold really. In terms of the mathematical propreity it is part of the function of adding up the total purchases of all securities including options bought in the account. In terms of the net effect of the transaction in deciding whether or not it adds to or detracts from churning, of course, the purchase and resale is done on an immediate basis and commissions are charged on both the purchase and sale.

In this case for a $10,000 capital turnover there would be commissions on the purchase and sale of 1,000 shares.

Q Wherever there was a call transaction, if there was a loss, would there be a salvage operation such as this?

A If you mean a loss such as here where there is some appreciation in the price of the stock over the striking price but not enough to result in a profit there were some of these transactions and some instances where calls were sold. If you mean a net loss on the transaction whereby the strike price or rather the market price at the time the option expired was below the striking price and thereforethe total premium was being lost, the total loss of the calls, in those cases the options just expire. In that case certainly no one would exercise the option on those facts.

Q Did there come a time when the account failed to involve the purchase of calls? I place before you Exhibits 9 through 21.

A There are no option transactions in 1966. There are no option transactions in 1965. There are option transactions in 1964 but none in '65 or '66.

Q This option transaction, how does it generate commissions to the customer's man?

A Well, in the example cited on the investment of $10,000 it would, upon the exercise, and immediate resale, it would be -- on the example cited with an investment of capital of only $10,000 it would generate commissions on the pruchase of $100,000 worth of securities and the sale of $105,000 worth of securities which would be a fairly significant amount of commissions for a $10,000 investment.

Q In other words, the commission would be a percentage for whatever the commission rate was of $100,000 or $105,000?

A Yes, the commission would be charged on the stock transactions, not on the option. It would be charged on the $100,000 value of the stock.

Q You have reviewed this account, have you not?

A Yes.

Q On cross examination Mr. Mandel used the word active trading account and highly speculative account and you answered certain questions with respect to those words. Will you tell the Court and jury whatyou mean by an account which is actively traded?

A An actively traded account that has a high frequency of purchases and sales over a period of time.

Q And what is a speculative account?

A A speculative account is an account in which the customer is taking higher risks in connection with his purchases by buying stocks that are not as well established, not as safe as someone who is buying for example blue chip stocks or stocks which are considered safer, less volatile.

Q So a speculative account has something to do with the quality of the stock purchased, correct?

A Usually that is the way an account is characterized, yes.

Q Where an account is actively traded how is money made forthe customer?

A By an excess of the sale price of the security less commissions. In other words, by profit on the purchase and sale of the securities.

Q Is there a differentbetween an account which is actively traded and an account which is churned?

MR. MANDEL: I object to the form of that question.

THE COURT: Overruled. You may answer it.

A Yes, an account that is churned is one in which, among other things besides the trading being initiated or instigated or recommended by the salesman or perhaps he in fact has discretion, in addition the nature of the trading is such that it benefits the salesman more than the customer in terms of who derives the financial benefit fromthe trading. In a churned account the trading benefits the salesman or the firm by way of commissions as opposed to necessarily being in the interest of the client who is deriving benefits from profits in the account.

Q Can you further explain the difference?

A Well, generally in a churned account the purchases and sales don't have any close connection with the price movement of the securities. In fact, the securities may well not move very much in price up or down and yet the stocks are bought and sold in a fairly rapid fashion.

Q Without regard to whether there is a profit generated for the customer?

A That would be the effect of selling a stock which hasn't moved up or down very much. If it has moved down obviously the customer lost money. If it moved up slightly the commissions to the broker may well have offset any small profit on the sale of the stock.

Q Would it be correct to say that you see a series of purchases and sales without any purpose other than to generate a commission?

THE COURT: Is this a question?

MR. SHAW: Still in the abstract, to differentiate between a churned account and an actively traded account.

THE COURT: I don't think he defined what he meant by actively traded account. I was waiting for that part of his answer.

THE WITNESS: Actively traded account is one in which the purchases and sales come within a relatively brief period of time, certainly a matter of perhaps a few months, if not less.

Q Where you have a churned account there is the same factor, in other words, the purchases and sales occur within a relatively brief period of time, correct?

A Yes.

MR. MANDEL: I object to that.

MR. SHAW: That is harmelss.

MR. MANDEL: I object. It is leading and conclusory..

THE COURT: Overruled.

Q There is a short holding period?

A Right.

Q But in an actively traded account which is not churned the stocks are sold where a profit is made or they are sold to cut off a loss, correct?

A Yes, exactly.

Q That is how you make money in trading, correct?

A Yes, by trying to minimize losses and maximize profits, of course.

Q Whatdo you find in this account?

A In this account in many instances, some of which I cited in my earlier testimony, there are purchases followed shortly by sales where the stock has either moved down or has moved up if at all very slightly and not even enough in many instances to cover commissions, in other cases just enough to barely yield a profit to the customer over the commissions.

Q I believe you illustrated that with respect to Westec during your testimony even though the stock was going up it was sold and then it was purchased and then sold, correct?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q Based upon your experience in this industry and based upon your analysis of these ledger cards I ask you this question: In your opinion, with a reasonable degree of certainty, is all these accounts which were actively traded or are these accounts which were churned?

A These accounts were churned, in my opinion.

THE COURT: Mr. Marcus, the answer to your earlier question gets down to motive towards the purchases?

THE WITNESS: Yes.

THE COURT: The actively traded account can look similar to the churning account in terms of the ledger sheets in the company and it is a question of motive for the purchases and the sales?

THE WITNESS: Yes.

THE COURT: We defined earlier what the two motives are. That is really the distinction, is it not?

THE WITNESS: Yes, that is correct.

THE COURT: All right.

Q Mr. Mandel gave you certain blackboard presentation of questions involving X, Y, Z over a period of time, XYZ Corporation.

Was that description where you had $10,000 at the beginning of the period and you buy X stock and then you sell it and then you buy Y stock and you sell it and you buy Z stock truly descriptive of the activity you find in this account?

MR. MANDEL: Objection. Thatis leading and improper.

THE COURT: Sustained. The account speaks for itself.

Q Did you find during certain quarters, and I direct your attention to the second quarter of 1964 that instead of $10,000 there was approximately an equity of $158,000?

MR. MANDEL: I object to that. It has nothing to do with the example.

MR SHAW: I have to illustrate it. Mr. Mandel has done it. To set forth the picture correctly it should be done this way.

Sustained.

MR. MANDEL: This is prejudicial and there should be an admonition.

THE COURT: Let us go forward. As I said before, ladies and gentlemen, it is the evidence that counts, answers [illegible] questions, colloquy is not evidence, anything I say is not evidence. It is what you remember the answers to questions to be.

Go ahead.

Q Mr. Marcus, in your opinion, does the issue of churning in a situation where the customer says I want to speculate and take risks in determining whether there is churning involve a question as to suitability?

THE COURT: I think he testified as to that earlier at considerable length and Mr. Grutman indicates that his memory is in accord.

MR. GRUTMAN: Yes, your Honor, my memory is in accord.

Q Where in the course of your day-to-day business you come to the conclusion that you should find out additional facts, do you make inquiry to determine if active turnover of ca;ital is in keeping with financial circumstances, assets and salaried income of the person doing the investing?

A Certainly.

Q Is it your position that a customer's man is free to invest and reinvest a customer's capital as many times as he wants provided the customer is intelligent and knows whatis going on without making any inquiry as to the impact this may have on his family?

MR. MANDEL: I object.

THE COURT: Sustained as to form.

Q I ask you this question: I would like you to add to the hypothetical question I asked you during direct examination, based upon your analysis of the ledger cards, the customer's account card and the fact that during this period, 1962 through 1966, the Buckleys had two children, subsequently five children, that the father was in the practice of giving the family $5,000 a year each year in Georgia-Pacific stock, that he had a salary of between 15 and $30,000 per year and that between 85 to 90 percent of the transactions were instituted by suggested and recommended by the customer's man or even thatonly 65 percent of the transactions were instituted and suggested by the customer's man, that this was, as you can see and certainly in these accounts, margin accounts, that there was telephonic contact between the customer's man and the customer between 5 and 6 times per day or from 6 to 9 times per day, or even two or three times a day, and at the end of the period his assets were as set forth in the previous scheule which you saw and that his age was 31 in 1962, I would like you to assume further that he had a master's degree and that he approved every transaction in the sense that although it was initiated and suggested by the customer's man he said yes, go ahead and do it, I approve, that he received confirmations of all the transactions and monthly statements and he kept stock records and he understood what was going on, that he prepared his own tax returns and that he wanted to make profits and he even wanted to speculate and he wanted to maximize the leverage that he had and at a point he had a large paper profit and didn't take his profit, that he read outside financial publicartons and even subscribed to them at the rate of $100 per month, that he kept his own records and knew what was going on, and during the period 1962 through 1966 didn't complain, is it your opinion with a reasonable degree of certainty based upon your experience and the facts that I have given you that there was a churning in this case?

MR. MANDEL: Objection, leading.

THE COURT: If that is the only objection I will overrule it.

A Ye,s on those facts I conclude thatthis account was churned.

MR. SHAW: No further questions.

RECROSS EXAMINATION

BY MR. GRUTMAN:

Q In the hypothetical question Mr. Mandel posed to you involving the salvaging vall the $10,000 investment resulted in a net loss in his computations of $5,000, is that correct?

A That is correct.

Q How far in addition to the arithmetic a $5,000 loss was a commission for the purchase of the $10,000 call?

A Yes, I referred to that.

Q Give me an approximation in ball park numbers of what the cost of that commission would be --

MR. MANDEL: As of that date.

MR. GRUTMAN: As of that date, yes.

A I would estimate and of course I am going on memory now, between 1500 and $2,000.

Q That is for the purchase of the 10,000 --

A Double, the purchase and the sale.

Q For the purchase of the call and for the in on the $100,000 purchase the out on the sale?

A Yes.

Q Total commissions would be a profit to the broker of $1500, right?

A To 2,000, in that range.

Q In actual expenses to the customer of $5,000 for the loss he took plus the $1500 in commission making a $6500 loss to the customer, is that correct?

A That is correct.

Q You mentioned on your computer you don't use a turnover ratio as one of the standard spitouts that the computer reports to you?

A That is correct.

Q Do you however use some other determinant which is a tip-off to you about excessive activity in an account?

A Yes, we ook for 12 transactons or items in a month as a way of isolating such accounts.

Q If you had more than 12 transactions in a month would that be some indication that would require looking into to ascertain whether churning was going on?

A Yes, once we find such accounts we look further to see whether or not the account may have been churned.

Q When you make those further investigations does the firm go to the customer's man dealing with the account to ascertain facts and particulars as to suitability and propriety?

A Among other things, yes, that is one thing we do.

Q Was is your testimony that there is some absolute and imputable rule of an X factor, say 2, which is the maximum number of times that any capital account can be turned over for any customer in any account?

A No.

Q You told Mr. Mandel that there were these 13 various categories or criteria which were weighed and evaluated, is that right?

A Yes, correct.

Q And as to whether or not churning has taken place in a particular account does that involve an evaluation of the interplay of those 13 criteria?

THE COURT: Those 13 criteria were factors regarding "acceptable turnover". That was the only thing as to which they bore.

Q I will ask you were those 13 criteria criteria which were used in ascertaining whether churning had taken place in an account?

A Yes, definitely.

Q And did those 13 criteria apply solely to turnover ratio or to the overall concept of churning?

A The overall concept which is far more than turnover ratio.

Q Do I understand from your testimony then, Mr. Marcus, that turnover ratios standing by itself does not determine whether churning has or has not taken place ipso facto?

A Correct.

Q For example, if you had the figures shown on Exhibit 49 and they belong to John Paul Getty or Mr. Onassis that would be one set of facts, wouldn't it?

A Of course.

Q But if it belonged to Tillie the Toiler, that would be another?

A Yes.

Q And what belongs to J. Paul Getty, what may be proper or suitable for John Paul Getty may not be suitable for Tillie the Toiler?

A Yes.

Q Sam the postman or David Buckley, is that right?

A That is correct.

Q Two more questions:

Insofar as ascertaining whether or not Churning is going on or improprieties have taken place from your background, knowledge and experience is there any obligation on the part of the originating house, that is to say the broker who gets the customer and initiates the orders to supervise and surveil the account?

A Definitely.

Q Lastly, a question was put to you initially as to whether or not you were being paid for your testimony.

Do you remember that question as originally posed by Mr. Mandel?

A Yes.

Q I take it that an agreement has been made to pay for the time which you are required to spend in having reviewed these accounts, prepared the analysis which you did and the time which you are spending in court, is that correct?

A Exactly, yes, sir.

Q Was there an agreement, Mr. Marcus, for your firm to be paid for anything other than your time?

A No.

Q Was there an agreement made as to what your testimony would be before you were called as a witness?

A No, definitely not.

Q Have you ever been called upon by the Finley, Kumble firm to review or analyze any other brokerage account?

A No, I have had no dealings with Finley, Kumble prior to this.

Q Therefore you never testified in this case in which we have ever appeared either as a party or as counsel on behalf of a client, is that right?

A That is correct.

Q Inasmuch as I understand that the amount of money which my firm has agreed to be responsible for will be a factor of the amount of time you spend here, is that correct?

A Right.

Q The more time the higher the bill?

A Correct.

MR. GRUTMAN: Thank you very much.

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RECROSS EXAMINATION

BY MR. MANDEL:

Q How much is your firm being paid per hour?

A I frankly don't know.

Q It hasn't been settled, is that correct?

A It will be some function of my salary divided into the time I spent here.

Q How much time have you spent on this case?

A I have it back in the office but I could come up with some figure here perhaps. I would say perhaps about twenty hours. That is just myself.

Q How about your subordinates?

A I don't have an exact figure on that but perhaps two or three man-days.

Q Answering Mr. Shaw's questions you felt you had enough facts to give an answer although you didn't have enough facts to give me an answer, is that correct?

MR. SHAW: Objection.

THE COURT: Overruled.

A That is correct.

Q In answering Mr. Shaw's questions did you make an assumption as to whether the decisions were really being made by the customer or whether the decisions were really being made by the customer's man?

A I am not sure I know what you mean by decisions. I have two different views of the assumption I made but I am not sure decision would be the most descriptive term for it.

Q Do you know what a rubber stamp acquiescence is?

A I have my own understanding.

Q Have you assumed in giving your answers that Mr. Buckley's authorization of the transaction was a rubber stamp acquiescence?

MR. SHAW: Objection. It can be the answer to every single put. I think it should be more specific.

THE COURT: Overruled.

A Did I assume that in --

Q In giving your answers.

A No, not rubber stamp.

Q If you were asked to assume given all of these facts that Mr. Buckley actually knew what each transaction was about and wanted to do that transaction of his own willing volition and understanding and heard the suggestions that he may have got, considered them and then reached his own personal considered decision would youstill say the act had been churned?

A Yes, I would.

MR. MANDEL: That is all.

(Recess.)

(In open court; jury present.)

CHARLES R. JORDON, resumed.

DIRECT EXAMINATION (Continued)

BY MR. SHAW:

Q I would like to direct your attention to the spring of 1966. Can you recall if at that point you began to have or had conversations with Mr. Buckley with respect to Westec stock?

A Is that your question?

Q Yes.

A I don't recollect what conversations I had with him at that particular time.

Q Can you recall attending a breakfast at the Plaza Hotel during the summer of 1966 where Mr. Hall who at that time was president of Westec was the speaker?

A Mr. Hall, yes, sir.

Q When was that?

A That was in July 1966.

Q Prior to July of 1966 did you have conversations with Mr. Buckley about Westec stock?

A I would imagine from time to time we probably spoke about Westec stock.

Q Other than that can you recall the conversation?

A The exact conversation?

Q No, in substance what he was saying to you and what you were saying to him during that period.

A I cannot recollect it.

Q Can you recall prior to the breakfast meeting in July of 1966 Mr. Buckley saying anything to you regarding Westec in the nature of a concern or a feeling of the jitters or anything to that effect?

A No, sir, I cannot, sir.

Q Did there ever come a time when Mr. Buckley advised you that he wanted to sell out his Westec position?

A No, sir.

Q Did you ever have a conversation with Mr. Buckley in which you advised him not to sell out his Westec position?

A I don't recollect any conversation to that effect.

Q Can you recall the day or the period of time when trading was suspended in Westec? I am sure you recall that day.

A The exact date I don't recall. I recollect it was suspended some time in August.

Q Shortly prior to the time trading was suspended, and by shortly I mean within a matter of days or a week or weeks, did you have any conversation with Mr. Buckley that you can recall with respect to Westec?

A Yes.

Q Was that conversation in person or over the telephone?

A No, I --

Q Was it in person or over the telephone?

A It was in person.

Q In person?

A Yes.

Q Where was that conversation?

A It was right after --

Q Where?

A Right outside or as we were leaving the Plaza Hotel after the breakfast on Westec securities.

Q In that conversation or at or about this time did you advise Mr. Buckley in substance that he should not sell out and say anything about a copper mine?

A No, at this conversation --

Q That is an answer to the question, thank you.

Were you in contact at that time with the PR girl at Westec?

A I may have been in contact with her to have Mr. Buckley invited to the breakfast.

Q Other than that contact do you recall being in communication or contact with the PR girl at Westec during the summer of 1966 or before the trading in the stock was suspended?

A I recollect I spoke to her but I think she called me.

Q On more than one occasion?

A I don't recollect.

Q Can you recall if during this period of time she was in frequent contact with you?

A In frequent contact?

Q Yes.

A No, sir.

Q Can you recall the PR girl at Westec ever telling you that there has just been a strike or a favorable discovery or a favorable development with respect to a copper mine of Westec located in Latin America and that peoplewere spreading rumors about the stock in an effort to depress the price of the stock so that they could subsequently buy it cheaply and make a profit? Did you ever receive that information?

A Did I ever receive that information?

Q Yes, sir.

A No, sir.

Q Did you ever tell David Buckley that?

A No, sir.

Q Did you have more than one in person conversation with Mr. Buckley regarding Westec during 1966?

A Before suspension?

Q Yes.

A No, sir.

Q It was just that one conversation at the Plaza Hotel after the breakfast outside?

A Outside walking back to his office.

Q Can you tell the Court and jury what your recollection regarding that conversation is?

A Yes, sir.

Q What did he say and what did you say?

A We had been at the breakfast meeting and Mr. Hall said that before the opening of the market that morning they were going to announce merger plans with Talley Corporation and in his talk he mentioned certain facts that may be determined or made me tell Mr. Buckley or advise Mr. Buckley that if I were in his position I would sell Westec and buy Talley and by so doing he would get back just as much Talley, it was supposed to be a 2 for 1 merger, that was going to be announced on the tape before the opening, and he would get just as much Westec if the mergerhad been consummated and at the same time reduce his debit balance and at the same time take advantage of the tax carry forward loss that he still had.

Q Are you referring to $500,000 tax loss carry forward?

A That is the figure I mentioned before which stuck in my mind.

Q At that point did you own about 6,000 shares of Westec stock?

A At that point I think I owned more than 6,000 shares.

Q Did you recommend to Mr. Buckley that he sell out his entire position in Westec stock?

A I did, sir.

Q At that point was the stock of Westec beginning to or had it been in a decline in price?

A No, it had been in advance.

Q Wasn't the stock of Westec selling for around 45 shortly before trading was suspended?

A I think it was suspended at a price of 45. It arrived there the day before just the announcement of the suspension.

Q From a high of 60?

A The day before, a high in the 50s.

Q It lost five points in one day?

A Or more.

Q Had it been trading at the rate or the price of 60 during the summer?

A As high as 66.

Q Did you have any conversation with Mr. Buckley about the fact that if he did sell out his position in Westec stock that this might have the effect of causing a depreciation in the market price of the stock or cause a further slide?

A Never did I make that statement to him.

Q If Mr. Buckley had sold out his market position in Westec could that have had an effect of causing the price of the stock to go down, all of a sudden sell 11,000 shares?

A No, sir, it was one of the most actively traded stocks on the American Stock Exchange and it was very heavy volume.

Q In addition to the shares which you and your family held in Westec stock during this period of time did Gross & Company have a position in Westec?

A I don't know, sir.

Q Did you ever learn that Gross & Company had a position in the stock?

A I don't recollect that I did or not. I honestly don't know.

Q Did you ever learn that Charles Gross individually had a position in the stock?

A I never knew Charles Gross --

MR. MANDEL: I am going to ask --

THE COURT: For representations as to the basis?

MR. SHAW: I make no representation.

THE COURT: The question should not be put in that form then. I sustain the objection and the jury will put those questions from its mind and I feel if you are unable to have a foundation, Mr. Shaw, you better go at this a little differently because there was an implied representation in the question.

MR. SHAW: I am quick to say that I am just inquiring.

THE COURT: All right.

Q Mr. Jordon, do you know if Mr. Gross individually had a position in Westec stock during'66-'65?

A I don't know, no, sir.

Q After trading in WEsteck was suspended did you have a conversation with Mr. Buckley?

A I think I did, yes.

Q Did you have a conversation with Mr. Buckley at the offices of Newburger, Loeb?

A In 1966?

Q Yes.

A I don't know whether it was in 1966 or in 1967.

Q Did you meet with Mr. Buckley's attorney, a Mr. Ryan?

A Yes, sir.

Q Were efforts made to obtain payment on Mr. Buckley's debit balance on his margin account and his wife's margin account?

A Yes, sir.

Q When the stock was suspended was the effect of the suspension to cause a valuation down to zero of his holdings of Westeck?

A Not immediately but at some future time they marketed down to zero.

Q As a result he had not enough stocks having any value to support the margin indebtedness, would that be correct?

MR. MANDEL: Objection.

MR. SAHW: I withdraw the question.

Q Was there a deficit as a result of the suspension of trading?

A He had a debit balance in his account. Being a margin account he had a debit balance against the amount of shares of Westec he held in his account.

Q Can you recall approximately how much that was?

A The debit?

Q Yes.

A Approximately about 280,000 in round figures.

Q That was after selling out all the other stocks in his account that weren't suspended?

A That I don't recollect.

Q After trading was resumed did you sell your stock in Westec?

A Yes, sir.

MR. MANDEL: Can you fix the date.

Q When was trading resumed?

A Trading was resumed I think in May 1969.

Q Can you give us the exact date trading was resumed, May what?

A I think it was May 12, '69

Q On May 12, '69 did you sell out your position in Westec stock?

A I sold 2,000 shares out on May 12th.

Q How many shares did you own as of that point?

A 6,000.

Q When did you sell the remaining balance?

A I sold about ten days later 3,000 more and about a week after that or approximately I sold the last 1,000 shares.

Q At about a price of ten, correct?

A No, I sold 2,000 shares at the opening at 11 and a fraction and 3,000 shares at approximately 9-1/2 and I sold 1,000 shares at approximately 8 and a fraction.

Q Can you recall that the average purchase price that you paid for these shares was approximately $3 per share?

A The approximate --

MR. MANDEL: Objection.

THE COURT: This is irrelvant,it seems to me. Sustained.

Q Can you recall if there was any conversation with Mr. Buckley at this point after trading was resumed to the effect that Mr. Buckley and all concerned would wait to see if the stock ever reached the point where its market price was such that upon the sale of the stock the debit balance could be satisfied?

MR. MANDEL: May I have that back, please? I missed part of it.

THE WITNESS: I didn't understand the question.

THE COURT: Rephrase it.

Q Was there any conversation between Mr. Buckley and you or Mr. Morris Newburger to the effect that on the resumption of trading Mr. Buckley's stock would not be sold but that the parties would wait to see if the stock ever went up to the point where the debit balance was equivalent to the value of the stock?

A I never had any conversation with Mr. Buckley or Mr. Newburger on that question whatsoever.

MR.SHAW: No further questions, your Honor.

Can we have a moment? Mr. Grutman may be some place else.

Your Honor, I have just one further question. I found the document I was looking for.

BY MR. SHAW:

Q Plaintiffs' Exhibit 4 for identification, I show you this document and ask you whose initials appear at the bottom next to the words branch manager or partner?

A Morris Newburger MB.

Q Are you sure that is not Mable Bleich?

A It is MB. I don't know. It is MB.

Q What is the significance of the initials MB appearing on this account card?

A I would imagine MB signed it as branch manager for our firm and for the firm of Newburger, Loeb -- I don't know. MB is here. There is a signature I don't recognize.

Q Is that the account card of Mary Buckley?

THE COURT: I take it on its face that is what it says?

THE WITNESS: Yes.

Q Does that indicate Mabel Bleich approved the opening of this account?

A It could very well be, I don't know.

THE COURT: You don't know?

THE WITNESS: I don't know. I see the initials MB. It could mean Mabel Bleich.

THE COURT: You don't know or recognize that as anybody's initials?

THE WITNESS: It's been too long ago.

Q Does MB also appear on the account card with respect to Mr. David and Mary Buckley?

A I would imagine this might be a B. It could be construed as something else. It could be construed as a B also.

Q Under the rules of the New York Stock Exchange and the procedures in effect at Gross & Company at the time weren't you required to fill out the account cards?

A What do you mean to fill them out?

Q To fill in the blank spaces.

MR. MANDEL: I object to the form of the

question.

THE COURT: Sustained.

Q Isn't it in fact true that the account cards have blank spaces in them?

A Yes, sir,in that particular one it does.

Q Wasn't the procedure at this time to fill out the information on the card?

A Yes.

MR. MANDEL: The procedureof what, Newburger, Loeb?

MR. SHAW Gross & Company.

MR. MANDEL: This is a Newburger, Loeb card.

Q Is this a Newburger, Loeb card or Gross & Company card?

A It is a Newburger, Loeb card.

Q Was it the procedure of Gross & Company clearing with Newburger, Loeb to fill out the card to indicate what banks he had, for example? Was it the procedure of Gross & Company to fill out the card to indicate the information about its customer when it was clearing with Newburger, Loeb?

A Yes.

MR. SHAW: No further questions.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q Who is Cedel Jordon?

A My wife.

Q On August 1966 when Westec was suspended how many shares of stock did you and your wife Cedel Jordon own together?

A 6,000 shares.

Q You are sure it wasn't 11,000 shares?

A That was the net figure was 6,000 shares.

Q You are sure it wasn't 11,000 shares?

A Thatwas the net fiqurewas 6,000 shares. We were long 12,000 shares together and short against the box of 6,000 shares.

Q But your interest in the Westec shares was in 12,000 shares, correct?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q Was there 1,000 shares owned in your name alone?

A There was 1,000 shares owned in one account, whether it was my account alone or the joint account I don't recall and the other account had the 11,000 shares and the 6,000 shares short.

Q Do I understand correctly it is your testimony that at the time Westec was suspended in two accounts, one in your name and one in the name of you and your wife you had an interest in a total of 12,000 shares of that stock, is that correct?

MR. MANDEL: Objection.

THE COURT: Sustained. He answered that question as to just what he had.

Q Did you tell Mr. Buckley what your position was in Westec shortly before the close down or suspension of trading in WEstec?

A I don't recollect --

THE COURT: That is repetitious.

MR. GRUTMAN: I didn't ask him this.

THE COURT: This was asked by Mr. Shaw.

Q You never told him.

Did you ever disclose to Mr. Buckley that you had other customers who were also in Westec besides himself?

A I could have. I don't recollect.

Q Do you recollect whether or not the total number of shares held by your customers besides yourself and your wife shortly before the close down in the trading of Westec was 39,689 shares?

MR. MANDEL: Is there such a representation?

MR. GRUTMAN: There is such a representation.

Q Did you not believe that there was a conflict of interest between your representation of Mr. Jordon on his account and the activity in the Westec stock for your own account?

A No, sir. I do not.

Q For a person holding the stock long they would benefit if the stock went up, isn't that correct?

A Yes, sir.

Q And for a person holding the stock short their profit would come if the price would go down, isn't that correct?

A Outright short, correct.

Q You held stock short?

A I held stock long. I was short against the box. My net position was long.

Q But you had some stock which was short?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q Were you doing that as a kind of hedge?

THE COURT: He answered that.

Q When you met Mr. Buckley how searching was your inquiry into his background and expertise in the securities world?

MR. MANDEL: Asked and answered.

THE COURT: Overruled. I will permit it.

A I not only asked many questions but he volunteered a lot of information.

Q From the information which you got you knew that he was a young man, isn't that true?

A Yes, sir.

Q And that he had no professional experience in the securities world, you knew that, didoyou not?

A He was never down Wall Street.

Q And --

THE COURT: The witness ought to be permitted to answer that question.

THE WITNESS: Repeat your question, please.

Q You knew he had no business experience in the securities world, isn't that true?

THE COURT: Read the question back that was asked.

(Question read.)

THE COURT: I got the impression you had more you were going to answer in regard to that question.

A But he seemed to know an awful lot about Wall Street and he had studied in the area of finance.

Q He told you that?

A Yes.

Q Did you find out what his study of finance consisted of?

A That he had studied in the business at some ivy league school. I don't recall the name of the school.

Q Did he tell you that he was in some way expert in finance, financial transactions and securities?

A No, sir.

Q Do you agree, Mr. Jordon, that a little knowledge is a dangerous thing?

THE COURT: Objection sustained.

Q Woud you agree that what Mr. Buckley possessed as you spoke to him was just a smattering of ignorance?

THE COURT: Objection sustained.

Q How would you describe Mr. Buckley's sophistication as an investor?

MR. MANDEL: As of what point?

Q At the time you met him.

THE COURT: 1959.

A Well, I didn't know immediately because I only met him in 1959 opening the account and it was over a period of time that I learned the sophistication of the market, people he knew in Wall Street, his contacts in Wall Street.

Q Are you suggesting the contacts he had in

Wall Street in some way equipped him with insider or specialized knowledge?

A Definitely, sir.

Q Who were the people?

A As I recall, Mr. Irish's customer's man at Merrill Lunch, Mr. Clancy who was I think a partner in a money management firm. Those are the only two names I recollect.

Q Did he ever do business with Mr. Clancy?

A I have no idea.

Q Did you have any idea what Mr. Clancy may have told him?

A I don't recollect Mr. Clancy told me because --

Q Otherthan the fact he knew these people did you have any knowledge of what his relationship with them was?

A Very close.

Q In a business sense?

A I don't know how close in a business sense but I know very close in a personal sense.

Q Mr. Jordon, prior to his involvement with you when you were working for Gross & Company or as a partner in Gross, what was the maximum debit balance that Mr. Buckley had ever had in any margin account, do you know?

A No, sir.

Q Did you ever inquire?

A No, sir.

Q Did you know that as time was going on in these transactions in which you were acting as a broker that he was running up a debit balance of several hundred thousand dollars?

A Did I know that he was running up a debit balance?

Q Did you have an awareness of it as it was accumulating?

A Yes, sir.

Q That was a real obligation which he had to pay to Newburger, Loeb when he made a profit or loss on the stock, wasn't that a fact?

A That is correct.

Q And didn't he tell you that the maximum aount of a debit balance that he ever had before he opened one through you never exceeded $15,000?

A No, sir, he never told me that.

Q And you never inquired?

A I don't recollect whether I did or not.

Q Because as far as you were concerned with each buy and each sell there was a profit to your firm by way of a commission, wasn't there?

MR. MANDEL: Objection.

THE COURT: Overruled.

A There was a profit through me personally?

Q That is not the question.

A Read the question.

Q For each buy and each sell there was a profit to your firm in each commission earned, isn't that true?

THE COURT: That isn't the question you put before.

MR. GRUTMAN: That is the question I am putting now.

THE COURT: That is not the question and the witness is taken out. You prefaced the earlier question with the wrd "because". I don't know whether you are aware of that.

MR. GRUTMAN: I wasn't aware. Absent that conjunction then.

THE COURT: Perhaps we better start afresh here.

Q In each sale and each buy there was a commission charge by your firm, right?

A There was a commission charge by Newburger, Loeb part of which we shared.

Q The bulk of which went to the firm in which you were a partner, isn't that true?

A I don't know the terms. I don't know whether the bulk --

Q You mean you can remember how much Mr. Buckley beyond the scope of what is permitted.

MR. GRUTMAN:I think the credibility of this witness is very, very much at issue and I think that considering the volume of trading in which he acted --

THE COURT: I will permit you certain latitude, of course.

MR. GRUTMAN:I am almost through. I am sorry I wasn't here when Mr. Shaw was completing the examination. I am almost through.

THE COURT: Very good.

Q Do you recollect having testified earlier today that you recalled that David Buckley told you at the time that he opened the account with you at Gross & Company that he had a 4 or $500,000 tax loss carry forward, do you remember giving that as your sworn testimony today?

A That is the figure that remains in my mind.

Q And does it remain in your mind that that is a figure that existed before he started that trading or after that trading had become a disaster to him?

A That was a figure he gave me before.

Q You are sure of that?

A Absolutely sure as it remains in my mind and as I recollect the figure.

Q And you couldn't be wrong about it?

THE COURT: I sustain an objection.

Q Do you remember what the provisions for the sharing of commissions were between Newburger, Loeb which was just the clearing house and Gross & Company which initiated the activity by procuring the customer?

A If I tell you that I have complete trust in Charley Gross and I never to this day knew what portion of the commissions --

MR. GRUTMAN: As far as the answer goes I ask it be stricken as gratuitous and self-serving.

THE COURT: I will permit it.

A I never questioned Mr. Gross as to what percentage of the commissions we were getting and Newburger, Loeb was getting. I was getting a certain percentage of the profits from Newburger, Loeb -- from Gross & Company rather and that was it. If I didn't have the trust in Charles Gross I wouldn't have become his partner.

THE COURT: I will strike the last sentence of that answer.

Q I take it Mr. Gross was a friend of yours back in '62 and is still a friend of yours today, isn't that true?

A Charley Gross was never a personal friend of mine. I had just met him while I was with Hayden, Stone.

He made his office with Hayden, Stone.

Q Didn't you come in to this courtroom yesterday and embrace Charles Gross, with your arm around him?

A I also kissed his wife. I kissed Mabel.

Q I asked you whether you did what I asked, did you put your arm around Charles Gross yesterday when you came in?

A I did.

Q Have you not previously testified that Charles Gross is a friend of yours?

A I don't recall I testified he is a friend of mine but he is a friend of mine.

Q You never interested yourself in what the business arrangements were between Newburger, Loeb and Gross & Company between 1962 and 1966?

A Never.

Q As a man who has been in the market for as long as you have, is it not customary that on the division of commissions between the clearing house and the originating house that the originating house gets the lion's share of the commission and the clearing house a smaller percentage?

A I had been a partner --

Q Can you answer the question?

THE COURT: Answer that if you can. Do you know that to be a fact?

MR. MANDEL: I object to the lion's share.

THE COURT: I think everybody knows what we are talking about here. I will overrule the objection.

A I would imagine we received the greater percentage at Newburger, Loeb.

Q Do you know what the custom and practice was?

A Pardon?

Q Do you know what the custom and practice was in the years 1962 through 1966 on the sharing or division of commissions between an originating house and the clearing house?

THE COURT: Newburger, Loeb and Gross?

Q Yes. Would your recollection be refreshed if I suggested to you, Mr. Jordon, that Gross & Company for initiating the business got 60 percent of the commission and Newburger, Loeb for being the clearing house got 40 percent, does that sound like the usual practice as it prevailed in the industry in the year '62 through '66?

A Yes, I think that would be the prevailing --

Q Since Buckley was a customer of yours what was your arrangement with the man that you trusted, Charley Gross, as to that portion of the 60 percent of the commission that went into your pocket?

MR. MANDEL: Objection.

(Sustained.)

Q What was your arrangement with Gross & Company about the participation that you had in commissions originated by you?

A I think I was working on 40 percent of the Gross portion, 40 or 42-1/2. It varied.

Q You got 40 percent of Gross' commission, is that correct?

40 percent of the Gross portion of the commission? Did you get 40 percent of the whole commission?

A I got 40 percent of what Gross received.

Q If Gross got 60 percent you got about 24 percent of every dollar of commission that was generated, right?

A Yes.

Q You got 24 cents on every dollar of commission earned?

A No, I got 40 percent of the commission -- 40 percent of the full commission and on the profits of Gross & Company I got 10 percnet of 40 percent of what he received, something to that effect.

Q Are you talling me you got 10 percent of the profits of Gross & Company as a whole?

A After all expenses, yes.

Q You got 10 percent of the profits of Gross & Company on an overall basis?

A Right.

Q And in addition you also received 40 percent of the commission earned by Gross & Company for customers whom you originated?

THE COURT: I will sustain an objection to the form of the question. Mr. Jordon, what did you get? Would you tell us what you got, please?

THE WITNESS: I recollect I got 40 percent of the commissions that were generated in the business that I did as a customer's representative.

THE COURT: Was it the entire commission or the commission after Gross & Company --

THE WITNESS: The entire commission.

THE COURT: 40 percent of the entire commission and the percentage of the Gross & Company income you early testified to?

THE WITNESS: That is right.

THE COURT: On that note, ladies and gentlemen, we will adjourn for the evening. 10:30 in the morning.

(Jury left the courtroom.)

(ADjourned to June 26, 1975, at 10:30 a.m.)

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NEUBURGER, LOEB & COMPANY, INC.,
et al
vs.
CHARLES GROSS, et al.
and
NEUBURGER, LOEB & COMPANY, a
New York Limited Partnership,
et al.

New York, June 26, 1975,
10:30 a.m.

Trial resumed.

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(In open court; jury present.)

CHARLES JORDON resumed.

MR. SHAW: I think Mr. Grutman was finished or was about to finish his examination.

MR. MANDEL: Is it my turn?

THE COURT: Are you through, Mr. Grutman?

MR. GRUTMAN: I thought I was, Judge. I think I am.

MR. SHAW: So therefore I am.

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Jordon, from the first day you met Mr. Buckley in 1959 until today has Mr. Buckley ever said to you, "I think you did something wrong in my account"?

A Never, sir.

Q Has Mr. Buckley ever brought any lawsuit or arbitration against you?

A No, sir.

Q Did Neuburger, Loeb & Company ever bring any lawsuit or arbitration against you?

A No, sir.

Q Did Gross & Company ever bring any lawsuit or arbitration against you?

A No, sir.

Q During the years that you were working with Mr. Buckley and acting as a broker or registered representative --

MR. SHAW: Objection.

THE COURT: What is the basis for the objection?

MR. SHAW: The objection is to form and also it assumes that he was working with Mr. Buckley. That is the fundamental question in this case, whether he was working with, for or against.

THE COURT: The objection is technical and it is overruled. Go ahead.

Q During the years you were working with Mr. Buckley and acting as a registered representative and talking to him on the telephone did Mr. Buckley solicit your opinions and recommendations?

A Yes, sir, he did.

Q Did Mr. Buckley ever give you discretion to make decisions and do transactions on your own?

A Never, sir.

Q Did you ever put through any transaction, buy or sell, of any kind for Mr. Buckley without his prior authorization?

A Never, sir.

Q What considerations motivated the recommendations which you made to Mr. Buckley over the years?

MR. GRUTMAN: Objection.

THE COURT: Sustained.

Q What were your motives? Did you have any motives behind the recommendations which you made to Mr. Buckley from time to time?

MR. SHAW: Objection.

THE COURT: Gentlemen, come up here.

(At the side bar.)

THE COURT: What is the basis for the objection?

MR. SHAW: It is not testimony; it's just a position. It's not evidence.

THE COURT: It goes to his state of mind.

MR. SHAW: His state of mind during four years?

THE COURT: You have charged that he was working for the interest of the brokerage house and not the customer. It seems to me he has a right to say what his motivation was.

MR. SHAW: During a four-year period?

THE COURT: Yes. You can't force him to stand mute. You say he was motivated by self-interest. It seems to me at the very least he should be allowed to say the basis for his actions. You can cross examine him and the jury will decide what went on but it seems to me he can hardly be forced to stand mute on this issue.

MR. SHAW: But he should give testimony rather than just a denial.

MR. MANDEL: They have already asked him about the motivation. They say because you had the stock you wanted to drivethe price down and this and that.

THE COURT: It may be. Obviously we are going to get into specificity either on your direct or cross.

MR. SHAW: I will withdraw that, your Honor.

THE COURT: All right

(In open court.)

(Question read.)

A Every stock that I recommended to Mr. Buckley or that Mr. Buckley bought on his own recommendation I gave him my honest and sincere advice throughout my dealings with Mr. Buckley, whether to buy or sell. My motives were to make money for Mr. Buckley.

Q Is that true of every recommendation and every piece of advice you gave during the entire relationship?

A Yes, sir.

MR. MANDEL: No further questions.

MR. SHAW: No questions.

THE COURT: You may step down, sir.

(Witness excused.)

MR. SHAW: The plaintiff calls Mary Buckley, your Honor.

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MARY SMITH BUCKLEY, a plaintiff herein, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Are you the wife of David Buckley?

A Yes, I am.

THE COURT: You are going to have to keep your voice up so that the last juror and counsel over there can year you.

THE WITNESS: I will try.

Q Are you the Mary Buckley who had an account at Gross & Company during the year 1962 through 1966?

A Yes, I am.

Q Did you ever meet anybody connected with Gross & Company?

A No, I did not.

Q Were all decisions with respect to the purchase and sale of securities in that account --

THE COURT: No, this is leading. Why don't you ask her what she knows about the subject.

Q What did you do, if anything, in relation to that account?

A I did nothing other than sign whatever I had to sign.

Q Did you file joint tax returns with your husband during the years 1962 --

A Yes, we always have.

Q Do you know what the concept or term "tax loss carry forward" means?

A No, I don't.

Q In any tax return that you have filed did you ever file a return in which it was stated that there was a $5000 tax loss carry forward?

A I don't know.

Q Each year prior to 1962 were your in-laws or family in the habit of giving certain shares of Georgia-Pacific to you and David and your children?

A Yes.

MR. MANDEL: I think that is leading, your Honor.

THE COURT: It's leading and cumulative too.

Sustained.

MR. MANDEL: May the answer be stricken?

THE COURT: I will permit it to stand.

Q Do you know what happened to those shares that were given each year prior to 1962 and during the period '62 through '64?

A I know what happened to some of them.

Q What happened to some of them?

A Some of them my father-in-law gave me for me to get help in the house with the children and the nurse. It was used for that reason and the rest my husband took care of it all.

Q Do you know what happened to the shares?

A Excuse me?

Q Did those shares have any relationship to Gross & Company?

THE COURT: Mr. Shaw, that is exactly that leading that I spoke about yesterday. You ask her what does she know happened to those shares. Please do not suggest an answer.

MR. SHAW: All right.

THE COURT: I thought I made that clear earlier this morning.

Q Do you know what happened to any of those shares in addition to what you told us?

A I know I have signed some over to my husband that were in my name and he did with them what he does with all the stock.

Q Do you know what happened to those shares during the period 1962 through 1966?

A Not specifically, no.

Q Do you know anything that occurred with those shares? You don't have to be specific.

A No, I really don't. I really can't say that I knew anything about it.

Q Did you ever have any conversation about Westec? Just yes or no.

Does the name Westec mean anything to you?

A Yes.

Q Did you have any conversation with your husband about Westec during 1966?

A I don't know if it was definitely in '66 but, yes, I have had conversation with my husband about Westec.

MR. MANDEL: Objection on the grounds of relevance.

THE COURT: Sustained.

Q Did you ever meet Mr. Jordon?

A No.

Q Do you have any knowledge whatsoever as to any account at Gross & Company in your name?

A I knew I had an account, yes.

Q Do you know what period of time you had that account?

A No, I really couldn't say. They send you statements. They send things in my name. An envelope would come with my name on it. Over a period of years --

Q Did you see the statements?

A I looked at them but they don't mean anything to me. I can't understand them.

Q Did you have a conversation with your husband about that account?

A We talked about it to the extent I knew we owned a lot of stock in it but that is all I knew. That is all we talked about. I didn't understand it.

Q You didn't understand it?

A No.

MR. SHAW: No further questions.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q Mrs. Buckley, are you a working woman?

A A paid working woman, no.

Q With all due respects, you are a homemaker?

A Yes.

Q In the years 1962 to '66 was your full-time activity being a mother, wife and homemaker?

A Yes, I believe we had three children in those years.

Q And five by the end of 1966?

A Two prior to '62 and five during '62 to '66.

Q And five children is the number of your children?

A Right.

Q Have you had any training of education in securities dealings or the financial world?

A No.

MR. MANDEL: Excuse me, your Honor. I am going to object. I think it is entirely irrelevant. I think the evidence is clear here that Mrs. Buckley left these matters in the hands of her husband and he took care of everything, and it is a question of his training and knowledge and understanding that is relevant to the issues in this case.

THE COURT: Mr. Grutman, how about that?

MR. GRUTMAN: She has a separate account, your Honor. I want to establish that she was a cipher as far as having anything to do with the activity in the account.

THE COURT: Hasn't that been established?

I think it's been established.

Q Mrs. Buckley, do you have any independent financial resources of your own?

A Other than dividends from stocks in my family, no.

Q And the stocks in your family, are they stocks that were acquired by your husband in his securities dealings?

A No, the stocks in my name, that I know of, mostly are stocks given to me as a gift.

Q Would that be from your family?

A No, from my father-in-law.

Q What was your father-in-law's practice concerning gifts made to your husband, yourself and your children? That is, in the years '62 to '66.

MR. MANDEL: We have been through this many times.

MR. GRUTMAN: Mr. Jordon testified that Mr. Buckley was so independently wealthy I think it is important to establish what that so-called independent wealth consisted of.

THE COURT: You mischaracterized his testimony. He was told that by Mr. Buckley.

MR. GRUTMAN: That is Mr. Jordon's testimony.

THE COURT: I am clarifying your comment on Mr. Jordon's evidence. He didn't say he was, he was told.

MR. GRUTMAN: I wish to establish what the fact is.

THE COURT: I will permit you to establish that.

Q What was Mr. Buckley, Sr.'s practice about the making of gifts to the members of your family?

A I think he gave us as much as he could under a certain -- I don't know what you are calling it. You are allowed to give so many stocks as a gift and he gave us that number each year, either at Christmastime --

Q Do you recollect what the sum was that you received in dollars?

A No, I don't. The stock changes in value.

Q I understand. At the time that it was given did it ever exceed more than $3000 per year per person for whoever received the gift?

A I don't think so but I don't know.

Q Other than the securities which were given by Mr. Buckley, Sr. did you have any other assets?

A No.

Q What happened to the securities that were given by Mr. Buckley, Sr. to you, your husband and your children?

A My husband handled all of them.

Q Do you know whether or not you still have those stocks or whether they were lost?

THE COURT: I think Mr. Shaw went into that, Mr. Grutman. Sustained.

Q During the years 1962 to '66 were you familiar with your husband's working schedule?

A Yes.

Q How many hours a day would he work?

A In New York?

Q Yes.

A Door to door he would leave at 7 and would come home at approximately 7:30.

Q Did he also do work at home?

A Yes.

Q How many days a week did he work?

A He went into the city five days a week.

Q Did he also travel in his work?

A Not much though.

Q In the years 1962 to 1966 do you recollect whether your husband was hospitalized?

A Yes.

Q Am I right that at a certain point your husband said to you something like this: "Mary, I am going to try to make some money in stocks and bonds and I want you to sign some papers to go along with the idea"?

A No.

Q Did you ever sign any papers to give your husband any authority in connection with brokerage house accounts, if you remember?

A Not that I know of.

Q You don't remember?

A Not that I know of.

Q Did you give your husband authority to deal with any brokerage house accounts in your name? I don't mean in a formal paper but actually.

A I trusted him to handle any money that came into the family, yes.

Q And he was to manage it,is that correct?

A Right.

Q And when brokerage statements came in your name you just turned them over to him, is that right?

A Right.

Q You really didn't understand them and you really didn't look at them?

A Right.

Q As of today wouldn't you say that whatever he did was with your permission and authority?

MR. SHAW: Objection. This is the third time that question has been asked.

THE COURT: Read that back.

(Question read.)

A Yes, but I understand more now than I did in 1962.

Q I am going to show you some papers, if I may come up with them.

I am showing you Exhibit 6, which is entitled "Customer's Agreement," a series of customer's agreements, and ask you whether this is your signature.

A Yes, it is.

Q And here is another page of Exhibit 6 and I ask if this isn't your signature.

A Yes, it is.

Q And here is another part of Exhibit 6 which says "Guarantee of Account" and I ask if this isn't your signature?

A Yes, that is my signature.

Q Now, I show you some pages of Exhibit 5 and ask if this isn't your signature.

A Yes, that's my signature.

Q And here again on Exhibit 5, is that your signature?

A Yes, it is.

Q Here again on Exhibit 5, is this your signature?

A Yes, it is.

Q Did your husband ask you to sign these pieces of paper that you signed?

A I guess so.

Q Charley Jordon certainly did not.

A No.

Q Charles Gross certainly didn't.

A No.

Q Mabel Bleich certainly didn't.

A Whoever she is, no.

Q Jeanne Donoghue certainly didn't.

A Whoever he is,no.

MR. SHAW: She.

A Whoever they are. Nobody asked me to sign. If I signed them no doubt my husband asked me to sign.

Q And your husband told you these were in connection with brokerage accounts, didn't he?

A I don't recall what he said.

Q Whatever he said it was all right with you, right?

A In that instance, signing that piece of paper, yes.

Q Am I right that there never came a time when you called up Mr. Jordon and said something like this --

THE COURT: I think she never spoke with Mr.Jordon.

Q You never spoke to him?

A If he called the house I answered the phone and he would ask me how the kiddies are, what the weather was like, how was the beach.

Q And you know who Mr.Jordon was?

A No, I didn't know.

Q But did you know what his relationship was with your husband?

A Certainly I knew he was handling stocks for my husband, yes.

Q Did you ever ask him any questions about the stocks?

A Mr. Jordon?

Q Yes.

A No.

Q So did you ever say or did there ever come a time when you said to Mr. Jordon, "Say, Mr. Jordon, I am not quite satisfied with what you and my husband Buckley are doing"?

A I never talked to him about stocks.

Q And you knew nothing about the stocks, you relied just on your husband?

A Right.

Q I think you said on direct that the family had no assets except the stocks, is that right?

MR. GRUTMAN: That was not the question. I object to the form.

THE COURT: Ask her her recollection.

Q The family had other assets. There was a valuable house, wasn't there?

A I am a little confused. We owned something other than stocks, cars and a house, yes.

Q When did you buy the house, Mrs. Buckley?

A The house we are living in now?

Q Yes.

A 1964. Probably 1964.

Q And the price of it was then in those days about 150,000? If you don't know, you don't know.

A I don't really know.

Q It's a big house?

A Yes, it's a big house.

jqa22 M . Buckley-cross

Q How many acres is it on?

A Approximately 11.

Q Eleven acres?

A Yes.

Q How many rooms?

A Twenty. I don't know. I would say 20.

Q How many servants do you have to keep the house?

A You are looking at her.

Q It seems to agree with the staff.

Were there times when you had nurses?

A When the babies were small, yes.

Q How many cars?

A I have one and my husband has one.

Q Did you take vacations?

A Yes, we take vacations.

Q Where do you go? I am talking about the '60s.

MR. GRUTMAN: This isn't supplementary proceedings.

THE COURT: I will sustain the objection to that question. How is that relevant? I can see the house is relevant. How is that relevant?

MR. MANDEL: We are talking about a standard of living and so forth. If your Honor has a doubt I the standard of living and the assets of the family. If you have it as a matter of gift. But if it's a trust, it's another.

THE COURT: I will sustain the objection on the gift.

MR. GRUTMAN: No further questions.

Thank you, ma'am.

THE COURT: You may step down.

(Witness excused.)

MR. SHAW: The plaintiff calls Lawrence Berkowitz to the stand, your Honor.

LAWRENCE J. BERKOWITZ, called as a witness by plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Berkowitz, are you a member of the bar of the State of New York?

A Yes, I am.

Q Are you also a member of the bar of the State of California?

A Yes, I am.

Q Would you give the court and the jury a brief resume of your educational and professional background prior to this day?

A I was graduated from college in 1962 with a Bachelor of Science degree, went to Brooklyn Law School in New York and graduated as a member of the Law Review and graduated as seventh in a class of 300 people. I went from there to the Securities and Exchange Commission in Washington, D.C., which was my first employment, and was in the employ -- in the Division of Trading and Markets office of chief counsel from from September, 1965 through December of 1968.

In that capacity I was intimately involved with interpretations and opinions and negotiations in some cases with the Congress involving the various securities laws, particularly those involving regulations of broker-dealers and national securities exchanges.

I was also involved during that period in helping to establish the stock exchange, to implement the plan for the establishment of a stock exchange in Brazil. Also in Israel, as I recall.

As a member of the SEC we got involved in the redrafting of the California securities laws and regulations that were adopted I believe in 1968 in California.

In January of 1969 I was employed by a brokerage firm in California as assistant vice president in the legal department and was general counsel for operations, legal operations, in the West Coast.

I left that firm in July or August of 1970 and was employed by Neuburger, Loeb & Company on November 3, 1970 in New York. I moved from California to New York for theoretically a very short period time.

I left New York in 1971, at the end, and returned home to California and left Neuburger, Loeb's employ in California in 1972 and started my own financial consulting business at that point in California and have subsequently been involved in mergers and acquisition business as well as most recently being in the manufacturing business in California making electronic components for the United States Army and Navy.

THE COURT: When were you in Neuburger, Loeb?

THE WITNESS: I was employed November 31, 1970 -- I ceased to be an officer on February 11, 1972 and left the employ of Neuburger, Loeb in September of 1972.

Q In what capacity were you employed by Neuburger, Loeb & Company on or about November 3, 1970?

A My initial position with Neuburger, Loeb was assistant to the managing partner and it kind of melted almost immediately into that of general counsel.

Q During what period of time were you general counsel to Neuburger, Loeb & Company?

A From November 15, 16, 1970 to February 11, 1971.

Q And thereafter were you connected with Neuburger, Loeb Corporation?

A Yes, I was.

Q In what capacity?

A I was general counsel and vice president of Neuburger Loeb & Company, Inc. from February 11, '71 through February 11, '72.

Q In connection with your employment by the partnership as general counsel did there come a time when you made an effort or did anything in relation to the account of David and Mary Buckley?

A I am not sure if I made an effort or --

Q I am asking you this: In connection with your employment as general counsel of Neuburger, Loeb would you describe to the court what your duties were?

A Well, the duties of general counsel generally are, in my particular case internal house compliance, supervision of litigation and existing litigation, and the compliance function of course is a preventative one and relations with the various regulatory bodies in New York, the American Stock Exchange and the Securities and Exchange Commission, National Association of Securities Dealers, and would also involve certain legal work involving mergers or investment banking-type functions or any other functions -- any other type of transaction the firm would be involved in would be an initial review certainly, and sometimes work would go on a final basis within the firm without going to outside counsel.

Q Are you familiar with the Neuburger, Loeb & Company suspense account?

A I am not familiar with the term, no.

Q Are you familiar with the Neuburger, Loeb & Company account of David and Mary Buckley?

A I am now.

Q Were you then?

A My initial exposure was --

Q The question is were you familiar then? I don't want hearsay to come in. I want just an answer to my question. Did there come a time in 1970 when you heard the name David and Mary Buckley?

A Yes.

Q Can you recall approximately when in 1970 you ran across that name or those names?

A It could have been or it would have been between November 15th and December 16th. It would have been November 15th, approximately, to November 30th, which was my first exposure to the account or to the names. I'm sorry.

Q Can you tell the court and the jury what, if anything, you did with respect to that account?

A When I was general counsel one of my initial functions was to put together a list of all pending litigation and to see what could be done in an effort to collect moneys owed to us, and in that connection I made a review of those accounts that we had, those open files that the firm had, in our compliance department and compiled the list of the various accounts and on the compilation I noticed that the firm had numerous accounts that had debit balances and long positions in Westec stock, with the largest position being held by David Buckley and the Mary Buckley account. I immediately ordered the stock sold.

Q What else did you do?

A I then was instructed --

Q Leave that out. What did you do? Only on the ground it is hearsay, don't tell us what anybody told you; just tell us what you did.

A I then went to the firm, the law firm, of Golenbock & Barell and collected all litigation files involving Neuburger, Loeb, brought those files to the firm of Finley, Kumble, to Mr. Herbert Roth at that firm.

Q Thereafter what, if anything, did you do in relation to this Buckley account?

A I reviewed the internal files of Neuburger, Loeb with respect to that account and all the other accounts that the firm had moneys owing to it on.

Q Did there come a time when the Buckley account was closed or there was a certain resolution made?

A Yes.

Q Were you active in relation to doing that?

A Yes, I was active.

Q Did you make a recommendation?

A Yes, I made a recommendation.

Q Upon your reviewing the file did you give any instructions to any person or persons to do anything in relation to the Buckley claim or, rather, the Buckley debit?

A The only thing I did upon reviewing the file was call Mr. Persky at Finley, Kumble and we had a discussion about the case.

Q Did you tell him to do certain things?

A No, I never told him to do anything upon my initial review of the file except discuss the matter. It's the first time I recognized that there was more than just money owing to Neuburger, Loeb involved in the case.

Q Did you give Mr. Persky certain instructions to do certain things?

A No.

MR. SHAW: No further questions.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q You came to Neuburger, Loeb on November 3, 1970, is that correct?

A That is correct.

Q Who brought you to Neuburger, Loeb?

A My initial introduction to Neuburger, Loeb --

THE COURT: Just a minute. Is this bearing on plaintiffs' case?

were dropping in.

MR. BJORK: It will continue like that.

MR. MANDEL: We may as well go through Berkowitz with everything.

MR. SILFEN: We object to that.

MR. BJORK: I object.

MR. GRUTMAN: Will you let me proceed to make sense?

MR. SILFEN: We object to that.

MR. SHAW: Let's see what happens first.

(In open court.)

THE COURT: Mr. Grutman, you may proceed.

BY MR. GRUTMAN:

Q At whose instance had you come to New York in 1970 to work as general counsel for Neuburger, Loeb?

A I was hired by the partnership Neuburger, Loeb & Company some time in October. I was in for two days and they hired me at that point.

Q You came to make your base here on November 3rd?

A That is correct.

Q One of the duties that you had was to supervise the outstanding litigation of the concern, is that correct?

A Certainly, yes.

Q Did you enter upon that phase of your activities immediately upon coming to New York?

A No. As I indicated, it was probably a week or so later when another person who was acting as general counsel retreated from those activities and I filled the gap.

Q Who had been primarily handling the litigation for Neuburger, Loeb?

A Ned Frank within Neuburger, Loeb and the law firm of Golenbock & Barell and Osmond K. Frankel, an individual attorney.

Q W[illegible]t Mr. Frankel a partner in the firm of Hays, St. John, Abrahmson etc.?

A Not that I am aware of.

Q The principal litigation was handled by which of these lawyers, Golenbock, Osmond Frankel, or who?

A Golenbock & Barell.

Q Did you visit their offices and canvass the files that they had?

MR. SHAW: May I be excused? There is a messenger outside.

A I visited their offices and collected all the files they had except one, I believe.

Q Was that the one --

A And I gave him a check for outstanding balance of their service.

Q What was the file they were left with?

A I believe it was the Neuburger, Loeb file concerning the purchase of the Buffalo Braves basketball team.

Q Among the files you retrieved and took back was one of them an outstanding arbitration claim involving David Buckley and Mary Buckley and Neuburger, Loeb?

A Yes.

Q And in that file who had commenced the arbitration?

A Neuburger, Loeb had commenced the arbitration.

Q And the law firm representing Neuburger, Loeb that commenced the arbitration against David and Mary Buckley was which law firm?

A Golenbock & Barell.

Q After you took the file back did you examine the pleadings?

A I did not examine the files. I delivered it to Finley, Kumble.

Q At some time did you examine that file?

A Yes.

Q When you examined that file, Mr. Berkowitz, what did you find?

MR. MANDEL: Let's say when.

Q First, what did you find? I will come to the "when."

MR. MANDEL: I object unless a time is stressed.

THE COURT: How is this relevant?

MR. GRUTMAN: It gets to the settlement of the churning claim because the Buckley case is the churning claim.

THE COURT: Your question sort of asked for a lawyer looking in there saying I found pleadings, I found correspondence.

MR. GRUTMAN: I wasn't talking about things as much as what did you find concerning the relationship between the parties after reviewing the file.

A I am not certain I understand your question.

Q A claim had been asserted by Neuburger, Loeb.

A That is correct.

Q And there was a counterclaim asserted by Buckley, wasn't there?

A I looked in the file. One of the memoranda I read, a number of memoranda concerned the trading in the account. I saw there was approximately 1100 trades done over a limited period of time. I was also aware at that point in time that the stock had never been sold for approximately a year following the resumption of trading and I was aware that the Buckleys had asserted a counterclaim against Neuburger, Loeb for churning of their account.

Q Did you learn who had been the originating broker on the Buckley account?

A I was quite surprised to learn that it was not Neuburger, Loeb but Gross & Company.

Q When you saw that it was not Neuburger, Loeb but Gross & Company did you come to some legal opinion?

A I immediately realized that the party primarily responsible was not Neuburger, Loeb on the churning claim but the originating broker, Gross & Company.

MR. MANDEL: Is this man being offered as an expert to state his legal opinion?

we object to any examination by Mr. Grutman that lends itself to a cross examination by Mr. Mandel on any issue other than the churning case. It is not supposed to happen now.

THE COURT: The problem is that certain things slip in and other things --

MR. GRUTMAN: They are inextricably intertwined.

MR. MANDEL: Dovetailed.

THE COURT: You will have to rely on the charge to straighten this out.

(In open court.)

THE COURT: We will stand in recess for 10 minutes.

(The jury left the courtroom.)

(Recess.)

(In open court; jury present.)

THE COURT: Go ahead.

BY MR. GRUTMAN:

Q Before the recess, Mr. Berkowitz, you told us that after looking at the file you realized, or so you thought, that the party really responsible was not Neuburger, Loeb but the originating broker, Gross & Company.

MR. MANDEL: I object.

MR. GRUTMAN: That is what he said. The reporter just read it back to me.

MR. MANDEL: We have something to clear up which was left open to the jury and cleared up at the side bar with respect to the nature of the testimony of this witness.

MR. GRUTMAN: I object to Mr. Mandel's gratuitous interjection.

MR. MANDEL: Before we came to the side bar I asked whether this witness was being offered as an expert or not and Mr. Grutman said partially yes and partially no, and a change was made in that position at the side bar.

THE COURT: Is he not being offered as an expert witness?

MR. GRUTMAN: That is correct.

BY MR. GRUTMAN:

Q To pick up the thread, Mr. Berkowitz, when you as inside house counsel came to the opinion that the party responsible was not Neuburger,Loeb but the originating brokerage house, Gross & Company, did you convey that idea to Mr. Persky of Finley, Kumble?

A That is correct.

MR. MANDEL: I object on the ground of leading.

THE COURT: Overruled.

Q Thereafter did you give Mr. Persky any instructions?

A Yes, I did.

Q What instructions did you give Mr. Persky concerning this Buckley case?

A In response to Mr. Persky's conversation with me that he had a potential settlement in the case, he asked me to get authority to settle, he had an offer.

Q Did Mr. Persky conduct these negotiations, to your knowledge?

A Yes.

Q Do you know with whom he was conducting them?

A Yes.

Q Who was that?

A The firm of Webster, Sheffield, and I believe the attorney's name was Ryan.

Q Prior to Mr. Persky's entry into this case do you know whether or not there had been any previous offer of settlement made on behalf of the Buckleys by the Webster Sheffield firm?

A Not to my knowledge.

Q Did Mr. Persky, after getting authority from you, continue the negotiations?

A I assume so.

Q Did he report to you what offer had been obtained from Webster Sheffield?

A Yes, he did.

Q What did he tell you Webster Sheffield had offered by way of settlement?

A He told me that Webster Sheffield had offered $50,000, payable in two installments that were rather close together, two installments of $25,000 each and an assignment of all claims against Gross & Company.

Q Was that part of the offer that had been obtained?

A That's correct.

THE COURT: Strike that answer. The question is leading.

Q Who had offered the assignment of the Buckley claims against Gross & Company?

THE COURT: What did Mr. Persky tell you had been proposed to him?

THE WITNESS: Mr. Persky told me that

it had been proposed to him that a $50,000 in cash would be paid in two installments of $25,000 each and an assignment of all claims by the Buckleys against Gross & Company would be given to Neuburger, Loeb and that they would cooperate in any pursuance of those assignments.

Q I show you a document now in evidence and marked Defendant Finley, Kumble Exhibit B, dated December 7, 1971.

A 1970.

Q Are you the author of that memorandum?

A Yes, I am.

Q After you submitted that memorandum did you obtain from somebody in Neuburger, Loeb & Company authority for Mr. Persky to consummate the settlement you have just described.

A Yes, I did.

MR. MANDEL: Objection. Leading.

THE COURT: Well, it is. But I don't see it does any harm.

MR. MANDEL: He says authority from somebody. He is getting in evidence --

THE COURT: I sustain the objection.

Q From whom did you get authority for Mr. Persky to consummate the settlement that you have described?

A Definitely Robert Neuburger, and I also believe that Andrew Neuburger and Robert Stern were present.

Q Were those people partners in Neuburger, Loeb & Company?

A Yes.

Q Did you convey the authority to Mr. Persky that you had gotten from the partners in Neuburger, Loeb & Company to carry out the settlement?

A Yes.

Q Was the settlement consummated?

A Yes.

Q Was an assignment obtained from the Buckleys of their claims against Gross & Company?

A Yes.

Q Was the payment of $50,000 made?

A Yes.

Q Were releases exchanged?

A I believe so, yes.

Q Would you tell us, Mr. Berkowitz, were you familiar with the general financial condition of Neuburger, Loeb & Company at the time that that settlement was consummated?

A Yes.

Q What was it?

A Neuburger, Loeb was in dire financial condition. It was short of capital and at that point in time was being threatened by the exchange with liquidation unless additional capital was forthcoming.

Q As the inside house counsel in charge of litigation, what were you trying to do to deal with that cash anemia?

A As I testified before I had been reviewing all litigation with a view to settling or pursuing claims as vigorously as possible in order to raise as much cash as we could, as quickly as we could.

Q Was that one of the motives that you had in disposing of the Buckley case as you did?

A Aside from the fact it was a very good settlement, yes.

Q At the time this settlement was agreed upon did you know Charles Gross?

A No.

Q At the time that this settlement was agreed upon, Mr. Berkowitz, did you have any animus against Charles Gross.

A I never met the man.

Q At the time that this Buckley settlement was made did you have any personal consideration about Charles Gross?

THE COURT: Sustained.

A No.

THE COURT: Sustained. Strike the answer.

Q Other than the reason that you gave us for making the settlement, was there any other reason for consideration given at the time that the settlement was made?

A No, other than what was stated in my memorandum, that was it. It's a good settlement.

Q Did you believe that there was merit to the churning claim?

A Certainly on the face of it, yes, I believed there was a pretty good shot at it.

Q And the shot at it would be against whom?

A Directed originally against Neuburger, Loeb but the claim should have been against Gross & Company.

Q Did you know whether or not Golenbock & Barell had represented Charles Gross personally?

MR. MANDEL: That is irrelevant.

MR. GRUTMAN: It is highly germane for

MR. GRUTMAN: Objection.

THE COURT: As to form. You are a party to this case?

THE WITNESS: I am a party.

THE COURT: You are a party to the action. Go ahead.

Q Isn't it true that in September of 1970 you were working in California?

A I didn't hear your question.

Q In September of 1970 you were working in California?

A No.

Q Where were you working in September, '70?

A No place.

Q You were living in California?

A That's correct.

Q Did you know a man named Fred Kayne?

A Yes.

Q And he was a friend of yours?

A No.

Q An acquaintance?

A He had asked me if I wanted to come to work.

Q Fred Kayne said to you in September of 1970, did he not --

MR. GRUTMAN: This is what was objected to when I asked about how he came to Neuburger, Loeb, Mr. Mandel rose and objected, and you sustained the objection, and now here is then the other side.

THE COURT: I thought you got into the subject of his employment.

MR. GRUTMAN: No.

MR. SHAW: I also think that the technique of direct examination should be used in these areas rather than cross examination because Mr. Mandel is making this witness his own witness on his claim against everybody else in the case. In other words, the alleged conspiracy.

THE COURT: I thought the circumstances of his coming to work for Neuburger, Loeb had been raised by one or the other of you heretofore.

MR. GRUTMAN: It was objected to. "When you came to New York November 3, '70 who brought you?" and objection by Mr. Mandel, side bar conference, and the issue was dropped.

MR. SILFEN: I believe the question was who retained Mr. Berkowitz, and Mr. Berkowitz testified that he was retained by the partnership. Mr. Kayne's name was not mentioned at all.

THE COURT: I have a memory of that. The objection is overruled. The subject of how he came to work to Neuburger, Loeb has been brought up.

MR. SHAW: We have had cross examination by leading questions.

THE COURT: If Mr. Berkowitz' coming to work for Neuburger, Loeb has been raised by prior questions I think there can be cross examination.

MR. SILFEN: I would like to state the objection by defendant Kayne at this time to any testimony about the circumstances under which he came to work at Neuburger, Loeb on the ground that it is not part of the churning claim and it is a part of an affirmative claim being alleged by the Gross defendants against Mr. Kayne which is not being asserted at this time.

For the record, I would object to any testimony about any fact and circumstance relating to Mr. Berkowitz' employment vis-a-vis Mr. Kayne.

THE COURT: Mr. Silfen, the subject matter of his coming to Neuburger, Loeb having been opened up by prior counsel, I will overrule the objection and permit inquiry.

Go ahead.

BY MR. MANDEL:

Q The fact is, Mr. Berkowitz, in September Fred Kayne was the managing partner of Neuburger, Loeb, right?

A I didn't work for Neuburger, Loeb in September. I can't testify from first-hand knowledge.

Q Didn't you look at the minutes later? Weren't you there? Are you saying you don't know that in September --

A I am saying that there were changes made constantly in the managing partners of Neuburger, Loeb, both at the behest of the New York Stock Exchange and otherwise. I don't know exactly when Mr. Kayne was the managing partner.

Q In September Fred Kayne had a conversation with you in which he told you that there was a chance that a group formed by him would be able to take over Neuburger, Loeb & Company, right or wrong?

MR. SILFEN: Objection to the form of the question.

MR. GRUTMAN: Objection.

THE COURT: Overruled. I take it there is a representation on the basis for this question.

MR. MANDEL: It is in his deposition.

THE COURT: I will overrule the objection.

MR. GRUTMAN: Are we going beyond the churning claim with Mr. Mandel's cross? Is the world at large going to be the subject of cross or just the direct?

THE COURT: There have been statements by the witness as to his belief as to certain claims, the validity of them --

MR. GRUTMAN: What does that have to do with the taking over of Neuburger, Loeb?

THE COURT: I concede this might bear upon the testimony concerning the circumstances of his coming with them, and I will overrule the objection.

MR. SILFEN: Will the record show that the objection is joined in --

THE COURT: The objection is on behalf of everybody here, Mr. Silfen.

Go ahead.

Q Would you answer the question.

A Would you repeat it. I don't remember it.

(Question read.)

A I don't recall the date of the conversation, nor do I recall Mr. Kayne saying it was a group formed by him or how it was going to be done.

Q You don't remember. Do you remember that Fred Kayne said to you that if you would come to New York and work for the partnership you would have an opportunity to come in on the ground floor with the new group?

A Yes, Mr. Kayne indicated something to that effect.

Q You know he did.

A I didn't hear you, sir.

THE COURT: Never mind. Strike the comment out. The jury will disregard it.

Q I am going to read you some questions and answers from your deposition on December 22, 1971, Mr. Berkowitz, and ask you if those were the questions and those were the answers, and I am starting on page 24, line 15:

"Q When is the first time you heard of the proposal to reorganize the partnership and to create a corporation?"

And then there is colloquy between counsel which I am skipping, unless --

MR. GRUTMAN: Go ahead.

Q And the witness said, "May I talk to my question for a moment please?"

MR. GRUTMAN: That is not the answer. The answer appears at line 10.

MR. MANDEL: One moment, please.

Q Did that happen?

MR. GRUTMAN: I object to the reading of colloquy. That is utterly improper.

THE COURT: Let me see the transcript.

MR. GRUTMAN: Do you have an extra copy for the court, Mr. Mandel? This is my only copy.

THE COURT: Strike out all of that colloquy. Do not read the colloquy.

MR. GRUTMAN: Would your Honor instruct the jury that during the deposition the witness is permitted to speak to his counsel. I ask that that be done because there seems to be a sinister implication of something improper.

THE COURT: I do so in this particular instance and I find it was appropriate for him to speak with his counsel at that point.

Q Mr. Berkowitz, your counsel at that time was Mr. Gei[illegible] right?

A I don't recall.

THE COURT: What does the record show?

MR. MANDEL: Mr. Gelb.

Q Is Mr. Gelb a member of the firm of Finley, Kumble?

A He worked there, yes, but I don't know if he was a partner or not.

Q At the time of this deposition you were being represented by the firm of Finley, Kumble and Mr. Grutman's law firm, which is representing somebody else here now, is that correct?

MR. GRUTMAN: I object to that. Thumb in the eye once in a while but not all the time, Judge.

MR. MANDEL: I object to that. All I do is bathe my adversary in adulation.

THE COURT: We established Mr. Gelb was a member of Finley, Kumble.

MR. GRUTMAN: Mr. Gelb was a partner in our law firm and is a partner.

THE COURT: And at that time he was representing you in this deposition?

TRE WITNESS: Yes. I was a witness and not a party to the case. I was not a defendant at that point in time.

THE COURT: You were not a defendant at that point?

MR. GRUTMAN: That is correct, Judge.

BY MR. MANDEL:

Q "Q When is the first time you heard of the proposal to reorganize the partnership and create a corporation?

"A September, 1970, approximately."

Does that refresh your recollection?

A No, as a matter of fact, that is incorrect. The first time I ever heard of the corporation being reorganized--the partnership being reorganized into the corporation, was really in December or so.

MR. SHAW: December?

THE WITNESS: December.

Q We will go on to the questions and answers.

You say your answer was wrong.

A Yes.

THE COURT: Have you established that that answer was given to that question?

Q Was that answer given in response to the question?

MR. GRUTMAN: Mr. Grutman will concede that Mr. Mandel in this instance has correctly read the transcript. He said approximately, "September, 1970, approximately," is the answer.

Q Was that your answer?

A If that is what it says, yes.

Q When I said, "And in what way did this come to your attention?" is that correct?

A I don't know.

THE COURT: Mr. Mandel, the customary form is to read the questions and the answers insofar as you feel they are relevant and then ask the witness whether he was asked those questions and gave those answers.

Q Did I then say to you, "And in what way did this come to your attention?

"A During a discussion with Mr. Fred Kayne"?

Did I ask that question and did you give that answer?

A If you say so. You are reading from the transcript. I really don't remember it, Mr. Mandel. I have no idea. It's four years ago. I just don't remember the question or the answer. I am not denying. I just don't recall.

Q Did I then ask you, "And what did Fred Kayne say to you and what did you say to him?

"A We were discussing my employment with Neuburger, Loeb in New York. He indicated to me that there was a possibility that a group he was putting together would be able to acquire substantialassets of the partnership and possibly reorganize the partnership"?

Did I ask that question and did you give that answer?

A I guess so.

Q "Q Did he indicate who the other people in the group might be?

"A I don't recall. I don't believe so."

Did I ask that question and did you give that answer?

A I believe so.

Q Did I then say, "Did Kayne indicate to you that at that time if you went to New York and worked for the corporation there might be a place for you, I mean worked for the partnership, there might be a place for you and the corporation when, as and if it came about?

"A Yes"?

Did I ask that question and did you give that answer?

A I believe so.

Q "Q And was that one of the inducements for your moving to New York?

"A Yes."

Is that correct?

A That's correct.

Q "Q Do you have a close personal relationship with Kayne, are you friends?

"A Yes."

Did I ask you that question and did you give me that answer?

A Yes.

Q "Q And have been for how long?

"A Since September of 1970."

Is that correct, that question and answer?

A Yes.

Q "Q Did Kayne tell you anything about -- in September of 1970, in your discussion in California, did Kayne tell you anything about why Neuburger, Loeb might have to reorganize?

"A Vague references to capital problems."

Did I ask you that question and did you give that answer?

A I believe so, yes.

MR. SHAW: I have another copy of Mr. Berkowitz deposition and I thought I might hand it to him. He could see he was asked certain questions and gave certain answers.

THE COURT: How much of this are you going to read? I am doing this in terms of mechanics. Read the entirety you propose to read and ask then whether he was asked those questions and gave those answers.

MR. SHAW: That would speed things along.

MR. MANDEL: I will do this in sections. That way I do not have all of this laid out because I don't know what the testimony would be and I am going to be --

THE COURT: Go ahead.

Q You actually came to New York when?

A I started employment on November 3rd.

Q You got to New York a little before then?

A I assume the night before.

Q Is it fair to say that between November 3rd when you got to New York and February 11th when the transfer agreement was signed there was a lot of activity back and forth, meetings with many lawyers, negotiations and disagreements which ultimately led up to the agreements of February 11th?

MR. GRUTMAN: I eschewed any question of the understanding of the agreement and proceeded solely on the proposition of the churning claim. Mr. Mandel had put me in a straitjacket and I think it's appropriate that he remain confined to the issue which you have ruled is all that this witness is testifying about. That's the churning claim, not the transfer agreement.

THE COURT: For reasons I will later put on the record I will overrule the objection.

A Yes.

Q Is it also fair to say that under the agreement of February 11th you acquired stock in the new corporation?

MR. GRUTMAN: I renew my objection.

MR. SHAW: May we have a continuing objection to this line unless it is done through direct examination --

THE COURT: I perceive this to be a cross examination that the jury will find highly relevant. Overruled.

A I received stock on February 11th. I don't know whether it was pursuant to the agreement or not. I just don't recall.

Q Is it fair to say that during December and January and February while you were working for the partnership you were also part of the group that was trying to form the new corporation to take over the business?

A That is not true.

MR. ESTERMAN: Objection.

THE COURT: The answer is no.

Q During December work was going forward on the proposed transfer, was it not?

A I don't think so, no.

Q Do you recall that a preliminary version of the transfer agreement was signed on December 31st?

A I believe there was an assigning on the 31st. My role was not involved in the transfer. I was working internally with the regulatory body and not the transfer agreement. I don't know when the drafts started coming.

MR. MANDEL: I move to strike on the ground that the answer is not responsive. My question was: was a preliminary agreement signed on December 30th.

THE COURT: I will permit your answer to stand but go ahead.

Q You were aware during December of 1970 that there were intensive negotiations and drafting and agreements and disagreements leading towards the possible transfer agreement?

A No. I wouldn't categorize anything here as intensive disagreements, no. Not during December.

Q Were there negotiations at all in December about the transfer agreement?

A Yes, I believe so.

Q And you were aware of them, were you not?

A I attended some meetings. I was aware that other people were going to meetings, yes.

Q And you were concerned as a member of the new team and also as general counsel of the Neuburger, Loeb?

MR. SHAW: Objection to the words "member of a new team," particularly in a conspiracy case. That assumes the basic issue here.

THE COURT: Sustained.

Q I am going to page 28 of Mr. Berkowitz' transcript, line 20, and I am going to read questions and answers to you, Mr. Berkowitz:

"Q Then when did it appear that the possibility was reintegrated or might exist again or was revised, it should have been revised?

"A Towards the end of December, I believe.

"Q What happened then?

"A There was a meeting at the office of Stroock, Stroock & Lavan with the limited partners, at which time the general partners made a pitch to the limited partners as to their continuing with limited partners withdrawing their notices and that they could reorganize the firm and would bring in a gentleman by the name of Steve Grutman and Mr. Freund. The limited partners answered that Mr. Risher and Mr. Muh make their presentation. They did so. I was not in the room at the time of the Risher and Muh presentation.

"Shortly thereafter, while still in the Stroock office, I believe Mr. Steefel from Stroock, Stroock & Lavan came out and asked us all to come back into the room and indicated that the limited partners wanted to go along with the new team. The general partners were out as far as they were concerned and they would try to negotiate, work out some kind of a settlement.

"Q Who was the new team?

"A As far as they knew, it was Risher, Muh and Kayne.

"Q But you knew you were also on the new team?

"A No.

"Q Why were you excluded from the meeting when the new team was excluded from the meeting?

"A I was general counsel to Neuburger, Loeb &

Company.

"Q Were you excluded while the general partners made their presentation?

"A I was not.

"Q But you were excluded while the new team made its presentation?

"A That is correct.

"Q Who excluded you?

"A I don't recall.

"Q Was a reason given for your exclusion?

"A Yes.

"Q What was the reason?

"A That I was general counsel, an employee of Neuburger, Loeb & Company.

"Q Can you connect the" --

MR. GRUTMAN: Can we have a side-bar conference? The reason I am asking for a side-bar conference is I don't see why Mr. Mandel is being permitted to do what he is doing at this point. I thought we had an understanding that there was a limited scope to Mr. Berkowitz' examination and I don't yet understand how Mr. Mandel can open up the world. This has nothing to do with the churning case.

MR. MANDEL: It certainly has.

MR. SHAW: What respect?

MR. MANDEL: This has to do with the honesty of Mr. Berkowitz' actions with regard to the churning claim which we claim was preposterous on its face.

MR. SHAW: It is a general attack on his honesty.

THE COURT: I have permitted this on the issues of credibility, motive and bias going to his direct testimony. I conceive it to be relevant on this issue. Mr. Mandel says that that is what he is offering it on. He hasn't phrased it quite that way and therefore I deem it to be relevant on those issues.

MR. SHAW: On that score everything in this case then becomes relevant.

THE COURT: Not necessarily.

BY MR. MANDEL:

Q "Q Can you connect the sequitur for me?

"A I can't explain someone else's motivation I am trying. I just really can't.

"Q Did you go with that objection?

"A Absolutely.

"Q As of now in your opinion was it proper to exclude you from the presentation of the new team and not from the presentation of the old team?

"A If you are asking would I be aware of where my loyalty was, it was to Neuburger, Loeb & Company, a partner," and I take it that meant partnership.

A Yes.

Q "If you are asking where emotionally I may have been tied or where my best chances of success were, it was to Risher, Muh and Kayne."

Did I ask those questions and did you give those answers?

A I sure did.

Q Were you familiar with the December 30th draft of the proposed agreement under which the new team would take over?

MR. SHAW: Objection to the continuing use of the words "new team."

MR. MANDEL: He has been using "new team."

MR. SHAW: You have been using it in your deposition.

THE COURT: It was used by him in the answer at page 29, line 14.

MR. SHAW: With respect to three persons.

THE COURT: That is right, and he so defined it very clearly.

(Question read.)

A I was at the time, yes.

Q What work did you do in connection with the negotiation or drafting of that document?

A I prepared a few of the exhibits. That was about it. The litigation claims against Neuburger, Loeb and existing contracts and continuing in leases and a list of that nature, that was about it.

Q What were the general provisons of that December 31st draft?

MR. ESTERMAN: Objection.

THE COURT: Sustained.

Q Do you recall them?

MR. SHAW: Objection.

THE COURT: Sustained.

MR. MANDEL: I am trying to show the witness' knowledge.

MR. SHAW: That is Exhibit 24 in evidence, your Honor. It's about a half inch thick.

MR. MANDEL: It's a question of his knowledge and his motive.

MR. SHAW: The court has discretion to curtail any testing of his memory in a document that size.

MR. MANDEL: Will your Honor take it subject to connection?

(Question read.)

THE COURT: I will sustain the objection.

Q Did you have knowledge in December, 1970 of the general provisions of the draft that was executed?

A When in December?

Q Any time in December.

A I just testified I was familiar with the December 31st draft. When I became familiar was probably a couple of days before when I first saw it.

Q Along the way?

A No, not along the way. I said a few days before December 31st.

Q Did you attend any other meetings in the month of December about the attempts to reach --

A Other than what?

Q Which one was that?

A You said "Did you attend any other meetings." Other than what?

Q Your deposition says you attended a meeting at Stroock, Stroock & Lavan.

A Is that what you are referring to? Fine. I attended the December 30th meeting, that I am certain of, and I am sure there were several others along the way, perhaps one or two more during December.

Q As general counsel of Neuburger, Loeb were you aware of the position of Charles Gross in connection with that partnership in December of 1970?

A I was aware that he had withdrawn as a general partner.

Q Were you aware that he had demanded return of his funds?

A No.

Q That is your best present recollection? That is.

Q Were you aware of the financial position of Neuburger, Loeb & Company in a general way?

A Yes.

Q Did you examine some of the financial papers of Neuburger, Loeb & Company?

A No, I don't believe so.

Q Did you testify on direct that there was an acute shortage of cash?

A I said capital, I believe, not cash.

Q Where did you acquire that information?

A It was rather general knowledge, first of all, around the office, and from discussions with people in the office, but I also knew it from Mr. Dilger at the New York Stock Exchange, an old friend of mine, and he told me they are going to close the firm any day.

Q Did you get that information from Mr. Kayne too?

A Mr. Kayne was in California during December. I don't recall ever talking about it with Fred Kayne.

Q How about Mr. Risher?

A We probably discussed it once or twice, sure. I don't see why not. We discussed so many things.

Q How about Mr. Muh?

A Probably the same.

Q Did you know in December of 1970 that Mr. Charles Gross had a positive capital position?

Do you know what the means?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled. Do you know what it means?

THE WITNESS: Yes.

A Which question are asking me?

Q Do you know what capital positive position means?

A Yes.

Q Were you aware in December of 1970 that Charles Cross had a positive capital position?

MR. SHAW: I submit there is another more probative way of establishing this and not this witness' general feeling of the subject.

THE COURT: It's a question of his awareness.

MR. SHAW: Solely his awareness, all right.

A I really don't recall when I became aware of whose capital position was whose. I really don't know.

Q Were you aware that under the proposal of December 30th a number of general partners were to be forgiven substantial capital deficits?

A Yes, in return for an assignment of an income tax refund.

Q In return for assignment of income tax refund what, they were to be forgiven the balance of the money they owed to the firm, right?

MR. GRUTMAN: Objection. How far does this credibility issue go? We are trying the whole case, including Mr. Mandel's counterclaims at this point.

MR. MANDEL: Yes.

MR. GRUTMAN: I say no.

MR. SHAW: And the problem is that it is going to totally submerge the issues which should be before the jury at this point.

THE COURT: Ladies and gentlemen, we wll stand in recess until five minutes of 2.

(The jury left the courtroom.)

THE COURT: I completely agree with your view that we don't want to get into extraneous issues. On the other hand, I heard testimony which he stated in his opinion the churning claim was a good claim. He stated he told Mr. Persky that. He stated that he told Mr. Persky that he wanted to collect this money. He testified to his belief and the validity of the churning claim and in a modified sort of way he said they had a good shot at it on the face of it. He testified that Mr. Persky said that this was a perfectly normal settlement, he had a settlement arangement.

Mr. Mandel's position here is that this was -- and this settlement was used for an entirely different purpose. I am stating it in an overjqa88

AFTERNOON SESSION

(2:00 p.m.)

(In open court; jury present.)

LAWRENCE J. BERKOWITZ resumed.

THE COURT: Go ahead.

CROSS EXAMINATION CONTINUED

BY MR. MANDEL:

Q I think on cross before lunch, Mr. Berkowitz, you said you only recalled one meeting specifically. I ask you now, isn't it true that you attended --

A I am not certain that I said anything of the sort and I am not sure what the question is now.

THE COURT: Start again and put a question.

Q I will ask you if it is not true that you attended many meetings concerning the proposed sale of assets from the partnership to the corporation during December and January and February?

A Yes. You asked me about December, I believe.

Q You did attend many meetings about the subject through the whole period, is that correct?

A Many meetings? I don't know how to characterize it. I attended a number of meetings, yes.

Q Let's turn to your deposition, page 35, line 5:

"Q What meetings can you remember going to?

"A Loads of them at Finley, Kumble, at Stroock, Stroock, at the Rosenman offices.

"Q During what period of time?

"A This was January, late December, probably through January, February of '71.

"Q Did you attend all of the reorganization meetings that were held?

"A No.

"Q How many did you miss?

"A I don't know.

"Q You say you attended loads of meetings in that period. Can you quantify that in any way? Would you say six meetings or 12?

"A I would say closer to 25 as a guesstimate.

"Q And these meetings you refer to, were they all large meetings of all of the interested parties or were some of them small meetings of the new team or small meetings of the old team?

"A It varied.

"Q Some of each combined?

"A Yes.

"Q Some large meetings?

"A Yes.

"Q And some small meetings?

"A That is correct.

"Q Of one faction or another, is that correct?

"A That is correct.

"Q Who invited you to attend the meetings of the old faction, if you remember?

"A The partnership, Robert Neuburger, Andrew Neuburger and Robert Stern.

"Q Who invited you to attend the meetings of the new faction?

"A Robert Muh, Paul Risher.

"Q Did you inform any of the partners that you were attending meetings of the Kay, Risher and Muh faction?

"A Absolutely.

"Q Who did you inform?

"A Robert Neuburger."

Did I ask those questions and did you give those answers?

A That is correct.

Q You knew all along, did you not, that Gross was a problen and an obstacle in connection with the proposed transfer agreement?

MR. GRUTMAN: Objection to the form of the question all along.

MR. SHAW: Objection.

THE COURT: Take that out.

You knew Gross was a problem, is that correct, at some time?

THE WITNESS: At some time, yes.

Q At what time would you say; right from the outset, didn't you?

A Absolutely not.

Q Turn to page 57 of your deposition.

THE COURT: Where is the other copy? The witnsss is using a copy that you furnished me and he doesn't have a copy.

MR. MANDEL: There should be one in the court file.

THE COURT: He had one this morning.

THE WITNESS: I left it on the bench here when I went to lunch.

THE COURT: In the interest of time use this one.

Q Page 37, line 10, did I ask these questions and did you give these answers:

"Q And when did you become aware that Gross was a problem in connection with the proposed transfer of assets?

"A I think I was told he would be a problem right from the outset of that.

"Q Which would be when?

"A The end of December, middle, end of December, it's difficult to pin it down.

"Q Who told you he would be a problem?

"A Fred Kayne, Risher, Muh, I believe"?

Did I ask you those questions and did you give those answers?

A Yes, I did.

Q Is that the fact?

A Did I know from the outset that Mr. Gross was going to be a problem, and I indicated to you that I didn't know from the outset that he was going to be a problem. I knew probably in December, when the original transfer agreement was signed, the end of December.

Q Didn't you say the end of December, middle, end of December?

A It's difficult to pin it down. There

were many meetings. It was a man I had never met.

Q You were aware, were you not, that Gross' name did not appear in the December 31st draft?

A I am not aware that that is correct.

Q Even as of today?

A I believe his name does appear.

Q Did his name appear as a signatory?

A I know there was a signature line for his name, yes.

Q In the December 31st agreement?

A I believe so.

MR. SHAW: Objection. We are talking about the agreement. Before we were talking about the draft. That is confusing.

BY MR. MANDEL:

Q Is that your best recollection?

A Which agreement are we talking about now?

Q The piece of paper, really not an agreement, it's a draft, that was signed on December 31st, were you familiar with that?

MR. GRUTMAN: That is objected to.

MR. SHAW: That is an inconsistency. Is he talking about the draft and the final agreement.

THE COURT: Sustained.

Q Let us go back, Mr. Berkowitz, to the question of when you first became aware of the Buckley claims. Can you place a date for that?

A Of the Buckley claims or the Neuburger, Loeb claims against Buckley? What do you mean?

Q When did you first become aware that Buckley had asserted claims against Neuburger, Loeb?

A Probably the end of November, beginning of December.

Q And that happened when you received a file from Mr. Silverman of Golenbock & Barell?

A No, that is not correct.

Q When did that happen?

A When I reviewed the files, the compliance files of Neuburger, Loeb. I never read Mr. Silverman's file. I handed it directly to Finley, Kumble.

Q You never looked at the file?

A No, I had about 25 files and I just brought them all over.

Q You say you reviewed the compliance files of Neuburger, Loeb in November or December and what did that compliance file consist of?

A Various memoranda between -- interoffice memoranda between Mr. Miles and Mr. Goldstein, I believe, and correspondence with Mr. Silverman, I believe, at Golenbock. I really don't remember any more. It's been years and years.

Q Do you remember anything about what you saw?

A Obviously I do.

Q What do you remember?

A I remember that there was a very interesting churning claim that was posted in that file that I was not aware of before.

Q What was the amount of that very interesting churning claim?

A What was the amount of the claim?

Q Yes.

A How can you judge the amount of a churning claim? I knew there were enormous numbers of trades. What the liability could be for such a thing is very difficult to judge.

Q You mean you did not see anything about a claim that had been made by the Buckleys?

MR. SHAW: Objection.

A Yes.

Q When the Buckleys made a claim there was an amount attached to it, is that right?

A I didn't know the amount of the Buckley claim. The arbitration paper was not in that file.

Q What did you know --

A I knew the Buckleys had made a claim, a counterclaim for churning.

Q And you saw that in a memo?

A Yes.

Q Who made the memo?

A I drew it up.

Q And you don't remember whether the memo set forth the amount of the churning claim?

A I don't recall.

Q Did the memo set forth any other claims made by the Buckleys?

A Not that I recall, no. I don't recall.

Q Are you clear that the memo you saw stated that the Buckleys had interposed setoffs and counterclaims in a pending arbitration proceeding?

A I am not sure the memo said they actually had done it or discussed it. The fact was it was a discussion of the trading by him and the Buckleys had raised the issue. That I know. Any other details of it, it's five years now.

Q What did you do to investigate, if anything --

was it your job to investigate the validity of the Buckley claim?

A At this point in time the case was being handled by Finley, Kumble.

Q Are you telling me that you did not personally investigate the validity of the Buckley claim?

A I reviewed all the customer's statements for Buckley that we had in the files showing all the monthly statements.

Q Did you do anything else?

A Reading the file which stated the amount of the claim, which showed the number of trades, the period over which they were made. That was the kind of investigation to see whether there was a colorable claim, and there certainly appeared to me to be a good one.

Q Did you say a colorable claim?

MR. SHAW: Objection. He said "colorable claim.

Can I have a continuing objection to this line of inquiry. Whether the witness believes or not that the claim is good I submit is totally irrelevant. The jury is supposed to determine for itself whether this is a good or bad claim. All these questions are totally irrelevant.

THE COURT: Mr. Mandel, what point are you offering them on?

MR. MANDEL: I am offering this to show that the claim was not settled in good faith, that it was settled as part of a conspiracy and that this witness' statement on direct --

THE COURT: I have overruled the objection. You may go ahead.

Q Besides looking at the volume of transactions what investigation, if any, did you make as to the validity of the claim.

A At that point in time I questioned Seymour Goldstein about the claim, who was my assistant, and I believe at that point I also got in touch with Finley, Kumble.

Q You spoke to Mr. Persky?

A I believe so.

Q You knew that Mabel Bleich was a partner of Neuburger, Loeb at that time, is that correct?

MR. SHAW: A limited partner.

A Yes, I believe I knew that at that point.

MR. SHAW: Objection. Isn't that a misstatement of fact?

THE COURT: Overruled.

A Yes, I knew she was a limited partner.

Q Did you ask her anything about the claim?

A No, I had no reason to.

Q You didn't know shehad been a partner in Gross & Company?

A I didn't even know who Gross & Company was.

Q Did you know Charles Gross had been a partner in Gross & Company?

A Only when I asked Mr. Goldstein who Gross & Company was.

Q So when you investigated the claim by talking to Goldstein you found out that Charles Gross was a partner in Gross & Company and you knew that was the same Gross who was standing in the way of the transfer agreement?

A Absolutely not. There was no transfer agreement at the time. There was no discussion, as far as I was concerned, of Mr. Gross being any kind of problem. I had never met the man. I never spoke to him. I didn't know anything about him. There was no reorganization going on at this point in time.

Q At which point in time?

A At the time I was looking at the Buckley claim. This was December 2nd,the end of November, the beginning of December.

Q When was the Buckley claim settled?

A Well, I think I recommended and instructed Mr. Persky between December 2nd and December 7th, around December 7th, I would guess, 7th, 8th, that is the date I wrote the memo.

Q When was the claim settled, Mr. Berkowitz?

A The date on which the final papers -- I have no idea. I was not involved in the legal transaction of settlement.

Q Before you said you satisfied yourself that there was a colorable claim, right?

A In my view there was a good claim there. There was a claim.

Q What does the word "colorable" mean as you used it?

MR. SHAW: Objection.

THE COURT: Overruled.

A What it means is simply this: You cannot determine the validity or lack of validity of a churning claim in any exactitude unless you go through a detailed computer analysis.Every firm has its rules of thumb as to how many transactions can take place within a period of time before you got a red light. There were red lights flashing on this one. It's as simple as all that.

Q Did you inquire as to the nature of the customer?

A I read the memoranda that were in the files --

Q What did the memoranda say?

MR. SHAW: Objection. This is the trial of a case within a case.

THE COURT: Overruled.

A The memoranda indicated that there had been discussions with Mr. Buckley at which he claimed that he was bankrupt, in effect, that he had no money, he had no assets other than what he had sitting at the Neuburger, Loeb account in suspension.

Q Did the memorandum indicate that from 1966 until the time that Neuburger, Loeb commenced an arbitration against Mr. Buckley he had never complained about the handling of his account?

A No, it did not.

Q Were you aware of that fact?

A No, I was not.

Q In those discussions you had with Mr. Persky did Mr. Persky tell you that fact?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A I don't recall.

Q In your opinion at that time was the volume, permissible volume, of business in an account related to the size of the equity in the account?

A Not necessarily, no. There is a relationship.

Q If this had been an account of Aristotle Onassis,knowing what you knew by looking at the pieces of paper,would you have concluded that there was a good churning claim?

MR. SHAW: Objection.

THE COURT: Sustained.

Q Did you make any inquiry of anybody as to the aims or objectives of the customer in the account?

MR. SHAW: Objection.

THE COURT: Overruled.

A I don't recall.

Q You don't recall whether you asked if it was a speculative trading account?

A I believe I looked at the customer account card which would have given the customer's objectives. What it said I really just don't remember any more.

Q Did you inquire as to whether it was a discretionary account?

A Yes.

Q What did you find out?

A From my inquiries with --

Q Persky?

A Mr. Goldstein indicated yes, that it was.

Q That it was a discretionary account?

A Yes. There was some question about it in Mr. Miles' memorandum, as I recall.

Q Was there a memorandum of Richard Miles that you read?

A There were lots of memoranda in the file. Miles was the compliance director at the time all this happened, at that time. I read various memoranda in the files so it must have been his.

MR. MANDEL: I call for the production of any memoranda by Mr. Miles.

MR. SHAW: Don't ask me. I have never seen it and it's never been referred to in any notice to produce or any subpoenas.

THE COURT: Are you aware of any such?

MR. SHAW: I am not.

THE COURT: Go forward.

Q Are you sure that you had a memorandum by Miles?

A Yes.

Q What did you do with it.

A I put it back in the file.

Q So your opinion was based in part on the fact that it was a discretionary account?

A My opinion as to what?

MR. SHAW: He didn't testify to that, your Honor.

THE COURT: Reframe that question including his opinion as to what.

Q I think you stated that there was a colorable claim, and I am asking you whether that opinion was based in fact upon your understanding that it was a discretionary account.

A Yes.

Q And the discretionary account meant that the customer's man made the decisions to buy and sell, is that correct?

A Yes, that would be in a discretionary account.

Q Did you discuss that question with Mr. Persky?

A I believe we discussed who had authority, whether there was authority. Again, I don't recall really how much we discussed about the churning claim because we were really looking at the debit balance in the account and the churning claim was really a secondary consideration at that point.

Q You weren't really too interested in whether the churning case was valid because you thought you couldn't collect?

A I wasn't interested in investigating and starting a computer analysis of the account at that point in time.

Q Why not?

A I didn't know when the arbitration was coming. That is why I called Finley, Kumble.

Q And there came a time there was an arbitration, right?

A Yes.

Q And you were made aware --

A I assume so.

Q You don't know?

A I don't know exactly when Webster,Sheffield and Mr. Persky got together, if they got together in an arbitration or an office, I am not quite certain.

Q As of then did you know? And we are going back to 1970, correct?

A Yes.

Q We are really going back to the months of November and December of 1970, right?

A That is correct.

Q During that period of time you were general counsel of Neuburger, Loeb & Company, right?

A Part of that time, yes.

Q And you took some action in connection with the Buckley claim, is that correct?

A I was asked to give a recommendation as to whether or not the proposed settlement was satisfactory.

Q When you gave your recommendation and made your judgment did you know whether or not there was an arbitration in effect?

A Yes, at that point I did.

Q And did you know what the Buckley claims were in the arbitration?

A I knew there was a churning claim. I wasn't aware of the amount of it.

Q What other claims were there besides the churning claim that you were aware of?

A That was the claim that I was aware of, the counterclaim I was aware of.

Q Nobody discussed any other setoffs or counterclaims with you?

A Let me say this, that is not true.

I was aware that as a legal matter the debit balance in the Buckley account was going to have a substantial setoff against it because the firm failed to sell out the Westec securities at the proper time. So the claim was not a $289,000 claim but closer to $100,000.

Q Because of failure to sell out, is that correct?

A That is right. In other words, on May 19, '69, when Westec resumed trading, there were 15,000, 14,000 shares of stock in the account and the stock was 11. They should have sold the stock that day. They would have recovered $140,000 against the $280,000 claim and the court was going to do the same for them.

Q Did you find out --

A So the claim was not nearly $289,000, it was closer to 130, 140.

Q Did you find out that it was Leo Stern who made the decision not to sell the Westec stock?

A No.

Q What did you find out about who made the decision not to sell the Westec stock?

A I was told by Mr. Goldstein that Mr. Gross had made the decision.

THE COURT: Gentlemen, I think, Mr. Grutman, Mr. Shaw, there must be no showing of this kind of response to an answer at that table and I will take appropriate steps if I see it again.

MR. MANDEL: I move to strike that as hearsay as to what he found out. He answered what somebody told him.

MR. SHAW: He was asked "What did you find out," and he answered the question. He was asked for hearsay and he gave hearsay.

(Question read.)

THE COURT: Motion to strike is denied.

Q Did you attempt to check that piece of information with anybody else?

A No, it was not really important.

Q What was the date on which Westec could have been sold, some time in '69, was it not?

A I believe that it was May 19th was the date the suspension was lifted.

Q Of 1969?

A 1969, yes.

Q And you knew then that by 1969 Mr. Gross was a partner of Neuburger, Loeb & Company and that Gross & Company was no longer in existence, is that right?

A No, I knew he was a partner, I didn't know anything about Gross & Company, quite frankly. I just didn't know it at that time.

Q Did you know about any other claim that the Buckleys made besides churning and the failure to sell their stock on time?

A Not that I can recall. I am not sure that the Buckleys made that claim about the failure to sell the stock on time. It was my analysis of what the liability of Neuburger, Loeb was going to be or the chance of recovery of the debit balance. You asked me what the setoffs were and this was a setoff. It was a setoff of like $140,000 because of the failure to sell the stock.

Q Did you know the total amount of the Buckley demands with all of their setoffs and counterclaims

A If I did ever know it, I don't at this point period.

Q You had certain conversations with Mr. Persky about settling the claim, is that right?

A That is correct.

Q When did these conversations occur?

A Oh, the latter part of November, and I know there was a conversation on December 2nd. There was probably a conversation shortly thereafter.

Q What was the conversation between you and Mr. Persky in the latter part of November?

A It was at that point in time that I was aware of the counterclaim by the Buckleys and Mr. Persky and I discussed what party -- discussed the fact that Gross & Company was not named as the defendant on that counterclaim and had never been impleaded in the arbitration proceeding when the liability was clearly not Neuburger, Loeb's but Gross & Company's.

Q That was your discussion with Persky?

A Yes.

Q And you both formed a conclusion that there could be no liability to Neuburger, Loeb & Company, is that what you are saying?

A I don't think we decided that there could not be liability. I think we decided that the liability truly belonged to Gross & Company. Whether somebody would find some other way we just didn't know. But we felt that the primary responsibility was Gross' because it was Gross & Company's customer. Gross & Company was not included in the action and they should have been.

Q What did you decide about that?

A I don't think we decided anything at that point in time during that conversation.

Q During that conversation did you instruct Mr. Persky to make a claim over against Gross & Company?

A I don't believe so, not at that time.

Q Did you give Mr. Persky any instructions in that November conversation?

A No, I don't believe so.

Q What was your next conversation with Mr. --

A I believe we had a conversation on December 2nd at which Mr. Persky called me and said that he had met with the people who were Buckley's attorneys and that the following settlement had been proposed, and wanted authority to go from me to effect that settlement.

Q What compromise did he tell you had been proposed?

A He told me that it was an offer of $50,000 in two installments of $25,000 each, plus an assignment of Buckley's claims against -- an assignment of Buckley's claims.

Q Against whom? Buckley's claims against whom?

A Assignment to Neuburger, Loeb of Buckley's claims.

Q An assignment of claims of Buckley to be used against Charles Gross of Gross & Company and Jeanne and Mabel, is that what he told you?

A First of all, I didn't know that Jeanne and Mabel were ever partners of Gross & Company until some time later.

Q Mr. Persky --

A Probably at the end of January or February I became aware of that.

Q Mr. Persky did not tell you that?

A Tell me what?

Q Call to your attention that Charles Gross and Mabel Bleich and Jeanne Donoghue were partners of Gross & Company?

A Absolutely not. We only spoke of Gross & Company as an entity.

Q And it never entered into your mind that

Gross & Company was connected with these three people, that is your testimony, right?

A I knew that Gross & Company had something to do with Mr. Charles Gross. I never knew anything about Mabel Bleich and Jeanne Donoghue. That is my testimony.

Q Did Mr. Persky tell you -- I am going back.

On direct examination you said something about a claim-over. Do you recall that?

A I am afraid not.

Q I think you said when you first looked at the file you had noticed that there was no claim-over made by Neuburger, Loeb against Gross & Company, is that correct?

A I noticed from the file that any claims had been made against Neuburger, Loeb & Company and no claim against Gross & Company, and Gross & Company was the carrying broker or, I mean, was the introducing broker.

Q Didn't you use the word "claim-over" on direct?

A I haven't the slightest idea.

Q Take my representation that you did.

MR. GRUTMAN: I object to that.

Q Do you know the difference between a claim-over and the assignment of a claim?

A No, I don't.

Q You do not to this day?

A No. I am not sure what context. I have no idea.

Q In the context of this case if a claim-over had been made in the Buckley arbitration can you describe what that would have meant and what that would have said?

A No.

Q Wouldn't the claim-over mean this: That Neuburger, Loeb would have said, "We don't know if there is liability, but if there should be any liability and we are stuck with damages we want Gross to make it up for us"? Is that a claim-over? That is, as you understand it as an attorney.

A I have never heard the term before. I don't know where I used it from, if I did use it, and I don't know what the term "claim-over" means. I understand the factual situation but I don't know the term "claim-over" as a term." I know the two words and what they mean.

Q Do you know a technical way that describes interpleading a third party --

MR. GRUTMAN: There is a difference between interpleader and impleader.

THE COURT: Go to something else.

Q Did Mr. Persky tell you that he was the one who suggested that an assignment be taken of the Buckley claim against Gross & Company?

A The Buckley family against Neuburger, Loeb?

Q Yes.

A Did Mr. Persky --

Q Tell you that it was his suggestion and not the law firm of Webster, Sheffield?

A No, he did not tell me that.

Q He didn't tell you that?

A I don't believe so, no.

Q Did Mr. Persky tell you that he wanted that assignment?

A No, Mr. Persky and I --

Q Let me finish the question.

-- that he wanted that assignment for the purpose of using it in the negotiations to get Gross and Bleich and Donoghue to go along with the proposed deal? The question is did he tell you that?

A Absolutely not. I don't think that Mr. Persky knew that Bleich and Donoghue were connected with Gross.

THE COURT: Please, strike that out.

the deal was closing, but certainly not at the time we are talking about.

MR. SHAW: Then I object and move to strike. It's irrelevant if it's after the transfer agreement, your Honor.

THE COURT: I didn't understand the answer to make it such.

MR. SHAW: He said he may have. Anything may have occurred.

(Answer read.)

THE COURT: Mr. Berkowitz, your answer I gather is your best recollection at the time, is that what you are saying?

THE WITNESS: That is correct. I can state categorically it was never stated to me at the time of the Buckley discussions and settlement. Perhaps this was stated during the discussions in January and February, when the deal was closed.

THE COURT: Very good.

Sustained.

BY MR. MANDEL:

Q Did you consult any partner of Neuburger, Loeb before authorizing Mr. Persky to consummate the settlement, including taking the assignment of the

Buckley claim against --

MR. SHAW: Objection on the grounds of repetition.

THE COURT: Somebody asked that, three partners he spoke to?

MR. GRUTMAN: Yes, Stern and the two Neuburgers.

MR. MANDEL: He said it on direct.

A I know it was Robert Neuburger and I asume it was Andrew and Robert Stern too.

Q Can you recall the date on which you discussed this with Robert Neuburger?

A Some time after December 2nd and probably before December 8th or 9th.

Q To the best of your ability, will you give me the content of your discussion with Robert Neuburger about getting authority to make that settlement?

A I indicated that I had spoken to Mr. Persky on the 2nd and probably had had several conversations with Mr. Persky since the 2nd at which it was suggested a suggested settlement with the Buckleys had been reached whereby the Buckleys would pay us $50,000 in two $25,000 installments and would give us an assignment -- give the partnership and assignment -- of his claims, or their claims against Neuburger, Loeb.

I told him that in view of the fact that the total amount owing by Buckley that was collectible was probably 130 to 140 thousand and that that would take attorneys' fees to go after, that we just didn't have the money to go and therefore the claim was probably worth -- the Neuburger, Loeb end of the claim was probably worth the $100,000 and if we could get 50 it was a good deal. In addition, we stood a chance, if we sued, of losing on the churning claims. I said, "Mr. Neuburger, there is a very good offer of settlement that we come out very well on."

Q Did you explain to Mr. Neuburger about the assignment of claim against Gross?

A No more than what I just told you. He understood what I was talking about.

MR. MANDEL: I move to strike that.

THE COURT: Yes, strike it out.

Q What did you tell Neuburger about the assignment against him?

A I told him there was a churning claim brought by Buckley against Neuburger, Loeb that we believed properly belonged being brought against Gross & Company and that we would take that assignment, the assignment of that claim as part of the settlement and perhaps use it some day to collect the money from Gross & Company.

Q To sue Gross & Company?

A Perhaps.

Q Did you discuss amounts with him?

A Yes, in the sense that I told him that if we viewed the claim as one merely for 130 or 140 thousand dollars and there was an offsetting liability, potential liability, in the churning claim against that, that economically speaking there was no way we could not accept the $50,000 and the assignment.

MR. SHAW: Objection and move to strike. I see no relationship between any of this testimony and the good-faith issue here. The only thing I see is settlement negotiations which the jury will have great difficulty in keeping track of and obscuring the elements of the churning case.

THE COURT: I think we have gone far enough in this line and I will leave the answer stand.

Q Are you now aware, Mr. Berkowitz, that the amount of the churning claim was only $75,000?

MR. SHAW: Objection.

THE COURT: Sustained.

What does his present awareness of his figure have to do with anything?

Q Were you then aware that the amount of the churning claim was only $75,000?

MR. SHAW: Objection.

THE COURT: Overruled.

A No.

Q You were not aware of the amount of the churning claim?

A No. I testified before that I don't have any present recollection whether or not I was aware of the amount of the claim at a certain time in November and December and I really want to stand by that. I don't know that I didn't know it was 75,000. I just don't recall when I knew or what I knew at that point.

Q At any time did you authorize Mr. Persky on behalf of Neuburger, Loeb & Company to file or to prepare and sign a federal complaint in this court, the Southern District of New York, in February, 1971 demanding damages against Gross & Company in the amount of $299,000?

A What was your question? I lost the beginning of it.

Q I said at any time did you authorize Mr.

Persky in or about February --

A The answer is no.

Q -- of 1971 --

A The answer is no.

Q Were you aware that in February of 1972 Mr. Persky and his law firm, Finley, Kumble, prepared such a complaint on behalf of the partnership of Neuburger, Loeb & Company as assignees of Buckley and Mary Buckley and David Buckley against Gross & Company?

MR. GRUTMAN: I believe that is incorrect as phrased. We acted on behalf of the corporation and not on behalf of the partnership. The corporation is the plaintiff.

MR. MANDEL: My friends are mistaken.

MR. GRUTMAN: May I look at it, Mr. Mandel?

MR. MANDEL: Yes. It has been identified on depositions and I am going to offer it now.

MR. GRUTMAN: You represent this is the one filed in this case?

MR. MANDEL: No, I didn't say anything about it being filed in this case.

THE COURT: Gentlemen, we have a question pending. Is there an objection to the question pending?

MR. GRUTMAN: I objected because in good faith I believe Mr. Mandel was referring to the complaint in the action before you and which, as I correctly stated, Neuburger, Loeb & Company, Incorporated is the plaintiff. That apparently is a different document which Mr. Mandel is referring to.

THE COURT: Let's find out what the answer is with reference to that document.

Q I show you Defendants' Exhibit O for identification.

MR. GRUTMAN: Can we have the date of the document?

THE COURT: Let's see if he knows.

Q Can you identify the signature appearing on the last page of it?

A It reads Robert S. Persky.

Q Can you identify Mr. Persky's signature?

A It's been a long time since I have seen the handwriting.

Q What is the date of the complaint?

A February 4, 1971.

Q Is this a complaint on behalf of a partnership --

A I don't believe it is.

MR. GRUTMAN: I object to referring to the contents of a document not in evidence.

THE COURT: Sustained.

MR. MANDEL: I offer it in evidence.

THE COURT: Sustained.

MR. MANDEL: I offer it in evidence.

MR. GRUTMAN: Objection. That is not the complaint in this action.

THE COURT: What grounds?

MR. GRUTMAN: On the grounds that it is irrelevant since it is not the complaint in this action.

THE COURT: That may or may not be.

MR. GRUTMAN: This witness does not know what the document is. He didn't authorize it.

THE COURT: Ask him about the document to see what his knowledge is touching upon it. The state of the record so far is such that I sustain the objection.

Q On February 4, 1971 you were the general counsel of Neuburger, Loeb & Company, were you not?

A Yes.

Q Did you authorize anybody to prepare Defendants' Exhibit O for identification?

A No.

Q To your knowledge, did any partner of Neuburger, Loeb authorize anybody to prepare Defendants' Exhibit O for identification?

A Not to my knowledge.

Q Did Mr. Persky tell you he was going to prepare Exhibit O for identification?

A I don't recall. I don't know.

Q Did you attend a meeting at which Mr. Persky -- did you attend a meeting prior to February 11th at which Mr. Persky showed the assembled people Exhibit O for identification and said the gross income --

MR. SHAW: Objection.

THE COURT: Overruled.

MR. MANDEL: I will stop the question there:

Q Did you attend such a meeting?

THE COURT: At which Mr. Persky exhibited O for identification.

A I attended a meeting. I don't know -- I have never seen that document before so I don't know what he showed but I do remember a meeting at which Mr. Persky did discuss a potential complaint being filed against Gross & Company.

Q Was that before February 11th? That is before the agreement closed.

A I just don't know. I just don't recall. I really don't know. During the end of January and February there were discussions going all different ways about who was suing whom, if this thing closed or if it didn't close. I really don't remember the detail as to what Mr. Persky said about this. I just don't remember.

Q Do you remember attending meetings prior to the closing day -- that is, February 11, 1974, or rather '71 -- at which Mr. Persky stated that if Gross and Bleich and Donoghue tried to block that deal they would be sued on the Buckley claim and many other claims?

MR. SHAW: Objection.

THE COURT: Is there a representation that this is provable?

MR. MANDEL: Yes.

THE COURT: Overruled.

MR. SHAW: May I have a side-bar conference on this?

THE COURT: No, overruled.

A I'm sorry, Mr. Mandel.

(Question read.)

THE COURT: Do you remember that in substance?

THE WITNESS: No, I don't.

Q Do you remember any discussions between yourself and Mr. Persky and any other persons concerning suits against Mr. Gross?

A When is this now, what time frame are we talking about?

Q Prior to February 11, 1971.

A I was at meetings at the end of January and beginning of February at which potential litigation claims against Mr. Gross were discussed.

Q Who attended those meetings?

A Various meetings with an awful lot of people involved in different meetings. I can recollect meetings with Mr. Richenthal, meetings with Ned Frank, where he was in attendance, probably Mr. Silverman at one time, maybe not. I don't remember the names of the counsel involved but there was the Stroock firm, the Rosenman firm. They all had representatives at various times in the meetings at which these were discussed. Golenbock was at the meetings too many times.

Q And you were there?

A I was there at some meetings, yes.

Q And Risher was there?

A I assume so.

Q And Muh was there?

A I assume so.

Q And partners of Neuburger, Loeb were there?

A Yes.

Q And the discussion was that if Bleich and Donoghue didn't go along with the deals they would be sued on the Buckley claim and many other claims, is that correct?

MR. SHAW: Objection.

THE COURT: Overruled.

A I don't really believe that that was the essence of the dissolution. People had believed there were claims against Mr. Gross. I don't know that Bleich and Donoghue ever were really discussed in terms of being sued at any general meetings.

Q How about Gross & Company?

A The Buckley assignment I don't really believe was discussed in terms of an imminent lawsuit during those meetings prior to the closing.

THE COURT: That isn't the question.

THE WITNESS: That was the only claim we had against Gross & Company, the only thing that could be relevant.

Q This was the only claim you had against Gross & Company, right?

A To my knowledge, yes.

Q And you knew that without this claim the minute you went through with that transfer agreement you would owe -- and Jeanne and Mabel didn't sign -- you would owe Mabel 75,000 and Jeanne 75,000, with $2000 of interest to each --

MR. SHAW: Objection. This is a summation.

MR. MANDEL: No. I am asking him what he knew.

THE COURT: I will let him discuss what he knew, if anything, having to do with what might be owed in this area.

MR. GRUTMAN: If anything.

THE COURT: Rather than the form you put. Do you have any knowledge or awareness of the legal responsibility of these three people?

THE WITNESS: Yes, your Honor. I believe Jeanne Donoghue at that point in time was entitled to $75,000 and I think we all agreed to it. We didn't know Jeanne Donoghue was a partner of Gross

& Company. I just found out a couple of days ago. We felt that the liability to Mabel Bleich for the $75,000 was possibly offset by the claim against Gross & Company.

Q The Buckley Claim?

MR. GRUTMAN: May he finish the answer, please?

A And any money due to Mr. Gross was offset many times over by claims including the Buckley claim and various other claims at Neuburger, Loeb during this period of management.

Q And it was your understanding, was it not, that if the deal went through and Gross and Bleich and Donoghue would not consent that all of these claims would be used to hold off paying the moneys that would otherwise be due them?

MR. SHAW: Objection.

MR. GRUTMAN: Objection.

THE COURT: The form is rather poor.

Is that your understanding of this incident?

THE WITNESS: I need it again.

(Question read.)

MR. SHAW: I repeat my objection.

THE COURT: Overruled.

A Not necessarily. I think at that point in time people were more afraid -- people were thinking more in terms of being sued by Gross & Company than are suing them.

Q But what would be the defenses? What was the defense available to the $75,000 owed to Mrs. Bleich?

MR. SHAW: Objection.

THE COURT: Yes. I think we are getting a bit far afield. Sustained.

Q Were you aware that Fred Kayne was initiating litigation in California against Gross a few days before February 11th?

A No.

MR. SHAW: Objection, your Honor.

THE COURT: The answer is no. Overruled.

Q On February 11th were you aware that Mr. Persky was preparing a complaint on behalf of the corporation against Gross & Company and Bleich and Gross?

A I testified earlier that I was aware of discussions. I was not aware of the actual preparation of the complaint.

Q But you knew that that was going to be done, correct?

A It could be, it was a possibility.

Q And you were aware that there was even a provision in the agreement that the new corporation could not settle with Gross without the permission of certain individuals?

MR. GRUTMAN: I object to that unless there is specific reference to the document.

MR. MANDEL: Give me your closing folder, Mr. Grutman, and we will put the document in evidence.

MR. SHAW: You want Exhibit 24, the transfer agreement?

MR. GRUTMAN: I don't want all those other exhibits.

Q Do you recognize your signature, Mr. Berkowitz?

A Yes.

Q Was that a document which you signed on February 11, 1971?

A It appears to be.

Q In connection with the transfer --

A A copy of a document.

Q I stand corrected. In connection with the transfer of the assets of Neuburger, Loeb & Company.

MR. GRUTMAN: I object to the form of the question because it artfully leaves open the ambiguity that Mr. Berkowitz' signature may be part of the transfer agreement and that document I don't believe is the transfer agreement. It may be an exhibit but it is not --

MR. MANDEL: It is a simultaneous document, isn't it?

MR. GRUTMAN: It seems to suggest to the jury that it is part of the transfer agreement and I object.

MR. MANDEL: It is part of the transaction.

THE COURT: Let's ask the witness what it is he signed.

THE WITNESS: A letter dated February 7, 1971 on Neuburger, Loeb & Company, Inc. stationery, addressed to Messrs. Steefel, Richenthal and Eisenberg, care of Mr. Steefel, who were representatives of the limited partners, former limited partners, of Neuburter, Loeb & Company.

Would you like me to read that?

THE COURT: No.

BY MR. MANDEL:

Q You recall that you signed that letter?

A I haven't read it yet.

Q All right.

A Yes.

Q You recall that you signed the letter?

A I recall the letter.

Q And this letter was signed at the closing of the transfer agreement, was it not?

A I assume so. I don't know.

Q And it's part of the bound closing file, is it not?

A I don't know. It speaks for itself.

MR. MANDEL: I offer it in evidence.

MR. SHAW: No objection.

(Defendants' Exhibit P was received in evidence.)

MR. GRUTMAN: No objection from us either.

THE COURT: Any other objection?

MR. ESTERMAN: No, your Honor.

Q At the closing -- may I read this to the jury, your Honor?

THE COURT: You may.

(Mr. Mandel read from Defendants' Exhibit P in evidence.)

MR. GRUTMAN: V.P.

Q I take it that means vice president?

A That is correct.

Q This paper, Exhibit P, was arrived at openly on the night of February 11 among all the people there, is that correct?

A Yes.

Q All of the people there and their attorneys knew that this piece of paper was being signed, is that correct?

A That is correct. I assume so.

Q And it was one of the essential papers that was signed that night as part of the entire deal, is that correct?

MR. GRUTMAN: Objection.

MR. SHAW: Objection.

MR. ESTERMAN: Objection.

THE COURT: Sustained.

Q You signed this on behalf of the corporation, is that correct?

A Yes.

Q As an officer of the corporation?

A That is correct.

Q And you were authorized by the corporation to sign it, right?

A That's correct.

Q And the directors of the corporation authorized you to sign it?

A That is correct.

Q And those directors were whom? They were Kayne, right?

A You asked me a question and I am trying to answer you, Mr. Mandel.

THE COURT: Let me see that letter that you are inquiring from, please.

A I believe the directors were Richard Stern, Robert Neuburger, Kayne, Muh, Sloane, Risher and Berkowitz, I believe. That is to the best of my recollection.

Q Kayne, Sloane, Muh, Risher, Berkowitz and Robert Neuburger --

A And Richard Stern.

Q And they all approved execution of Exhibit P, right?

A That is correct.

Q And Exhibit P says this, doesn't it --

MR. GRUTMAN: Objection. The document speaks for itself.

MR. SHAW: And it's been read.

MR. MANDEL: I would like to ask him about it.

Q Exhibit P says this, does it not, Mr. Berkowitz --

MR. SHAW: Objection.

THE COURT: Let's see what the question is.

Q It says, "We won't settle our claims against Gross by paying him certain things unless you agree to it," isn't that right?

MR. GRUTMAN: That is not what it says, your Honor. That is a deliberate distortion. It says prior to.

THE COURT: The exhibit does speak for itself.

Is that a construction of the exhibit?

THE WITNESS: Very barely.

THE COURT: It's possible?

THE WITNESS: It's a one-page agreement, one paragraph that is self-explanatory.

MR. MANDEL: I would like to ask the witness what certain lines mean.

MR. GRUTMAN: That is objected to. That is not for a witness to interpret.

THE COURT: Sustained. Ask him if there was any conversation leading up to that exhibit.

Q Did you have conversations that night concerning this agreement, this Exhibit P?

A Yes.

Q What was the substance of the conversations and who participated in them?

A The representatives of the limited partners, particularly Mr. Richenthal and Mr. Steefel were quite adamant that as soon as this deal closed, that Neuburger, Loeb would not go out and make a separate settlement on better terms than they had received, a settlement with Mr. Gross on better terms than they were receiving now by signing the agreement. That is without their prior approval.

MR. SHAW: Objection and move to strike.

THE COURT: Overruled.

Q They didn't want the settlement of the claims against Gross to be settled --

A That is not what it says.

MR. GRUTMAN: Objection.

THE COURT: Sustained.

Q Doesn't it say "enter into any settlement of the claims that we have against Charles Gross," aren't those the words, do I read them correctly?

A Let me take a look.

Q I ask you to read it: you shall not enter into any settlement of the claims we have against Charles Gross by paying him something more than this or that.

A Yes.

Q That is what it says?

THE COURT: On that note we will take our midafternoon recess.

(The jury left the courtroom.)

(Recess.)

(In open court; jury present.)

THE COURT: Go ahead.

BY MR. MANDEL:

Q Mr. Berkowitz, was there a discussion on the night of February 11th about the Buckley claim?

A Not specifically that I can recall.

Q Nobody said anything one way or the other about it?

A Specifically, no. Not that I can recall.

Q Was there a general discussion about the Buckley claim?

A I don't believe the Buckley claim was mentioned, to the best of my recollection.

Q Was there a discussion of any other claims against Charles Gross or Mabel Bleich or Jeanne Donoghue?

A On the night of the closing, no, I don't believe so. I just don't recall that at all. People were too busy signing documents and reading them. I don't believe there was much discussion about that.

Q Prior to that had there been discussions about claims against any of these three people, prior to the night of the closing?

A Yes.

Q Did you investigate the validity of any of those claims?

MR. SHAW: Objection, your Honor, repetitious.

THE COURT: Certainly in part that is true.

MR. SHAW: What difference does it make? Isn't the jury to make that determination themselves rather than what the investigation four years ago was?

THE COURT: This has to do with the state of mind at the time. Part of that is repetitious.

MR. MANDEL: Is it your understanding that at the present time I should confine my examination of this witness to the matters which relate to the Buckley churning claim and save for another moment --

THE COURT: You have been cross examining on the direct presented to you.

MR. MANDEL: Which would go to all claims.

THE COURT: I can't advise you as to what is open. You have to use your good lawyer's common sense as to what was presented on direct and govern yourself accordingly.

BY MR. MANDEL:

Q Exhibit P was signed by you as you have testified. Who actually drafted it? Mr. Persky, wasn't it?

A I don't know. I didn't.

Q You did not draft it?

A No.

Q Who handed it to you to sign?

A I don't know. We were shuffling an awful lot of paper that night.

Q Who was representing the corporation as attorney at the closing on February 11th? It was Mr. Persky, wasn't he?

A Finley, Kumble, yes.

Q Mr. Persky was the one, and Mr. Bamberger?

A Mr. Rosenbloom and other people there.

Q From Finley, Kumble?

A Yes.

Q I would like to have them. Persky, Bamberger, Rosenbloom -- who else from Finley, Kumble?

A I think that is all.

Q And they were representing the corporation, right?

A That is my understanding, yes.

Q As attorneys. And they prepared the papers for the corporation to sign, right?

A Yes.

Q And Exhibit P -- Finley, Kumble was representing the corporation, and to the best of your knowledge somebody at Finley, Kumble prepared Exhibit P and gave it to you to sign, is that right?

A Yes.

Q I assume you read it?

A I assume so too.

Q I assume you understood it?

A Yes.

Q And it referred to certain claims,right?

A It referred to more than that. It referred to the settlement of claims.

Q Of certain claims.

A Yes.

Q Tell me what claims Exhibit P refers to.

A It speaks for itself. It refers to claims. There may have been claims at that time that were not discovered so that I don't think anyone would try to be specific in that document.

Q Do you know of any claims besides the Buckley claim that were referred to in Exhibit P?

A Yes.

MR. GRUTMAN: Objection.

THE COURT: Overruled. The answer is yes.

Q Name them.

A I believe there were claims concerning mismanagement of a partnership trading account, certain violations of the capital rules that brought on New York Stock Exchange sanctions, misstatements that brought on New York Stock Exchange sanctions, the Buffalo Braves transaction, a lease -- there were a whole series of claims.

Q Well can you remember any more?

A I just don't recall any more.

Q Do you remember that Mr. Persky asked you -- I should put it differently. Do you remember whether Mr. Persky asked anybody to prepare a list of claims that could be asserted against Mr. Gross?

A I don't think Mr. Persky ever asked. I think Mr. Frank supplied somebody with a list.

MR. GRUTMAN: Can we have a date as to when that happened?

THE COURT: No, you may ask about that in your future examination.

Q Do you know whether Mr. Persky asked Mr. Frank two or three times to get up such a list?

A I don't know how many times he asked him.

Q You do know that he asked him to get up such a list, do you not?

A I don't know that Mr. Persky asked him. I know that Mr. Frank did draw such a list and I don't even know that he reviewed it with Mr. Persky. I don't even know Mr. Persky asked him to draw such a list.

Q You don't know?

A No.

Q Did Mr. Persky ever ask you to draw such a list?

A Not that I recall.

Q Did you ever see such a list?

A As I recall, what happened was that Mr. Frank never did present a list but just orally went over certain things that were subsequently reduced to writing.

Q Reduced to writing by whom?

A I really don't know. It was at the Finley, Kumble firm that the meeting took place. I think it was with Mr. Gelb but I don't recall exactly now.

Q Do you recall a meeting at the Finley,Kumble firm at which there was a discussion of a list, of preparation of a list of complaints that could be used against Mr. Gross, right?

A I don't know that I would frame it like that. There was a list of claims. I don't know they were all against Mr. Gross or to be used against Mr. Gross but these were things that had been discussed and this was factual background on it.

Q When did that meeting take place?

A I think the meeting with Frank took place after the closing.

Q Immediately after February 11th?

A I didn't say immediately. I think it was subsequently -- really a long time after the closing, is my recollection.

Q Do you know when this particular litigation in this court now was commenced?

A I know it was started -- the action commenced in 1972 some time.

Q Do you know that it was started within a week or so after the closing on February 11th?

A That is my understanding, yes.

Q And you authorized it to be brought, right, along with others?

A I didn't say that.

Q Did you?

A No.

Q Weren't you a director of the corporation?

A I was a director of the corporation.

Q Did you vote in favor of bringing this action against Mr. Gross and Miss Bleich?

A I was aware that the action had been brought. I don't know that we ever discussed it at a directors meeting that I am aware of.

Q Let me ask you simply, in your opinion or your knowledge did the corporation authorize the bringing of this action?

A Yes.

Q And you were one of the directors, right?

A That is correct.

Q And it's the board of directors that has the power to make that authorization, is that right?

A I am not certain. They do but I am not certain that the board of directors has to act on everything that a corporation does and that action can be brought by executives without having to get the board's approval.

Q Let me ask you this way: Did you personally, that is, Mr. Berkowitz, in any corporate capacity, authorize the bringing of this instant action by the corporation against Gross and Bleich? Yes or no, if you can.

A Certainly not before it was brought, but I certainly did ratify it. I never objected to it once I knew of it.

Q Nobody asked you whether it should be done is what you are saying?

A Not really, no, that is correct.

Q But you knew in advance that it was going to be done?

A I didn't say that either. I don't think I did. I learned of it later, that there was an action brought. It wasn't surprising to me, I will say that.

Q What forewarning did you have?

MR. SHAW: Objection

THE COURT: Sustained. That is as to form.

Q What prior information about it did you have?

A Mr. Mandel, I testified 25 times today that we had discussion after discussion and there were meetings held at which the claims were discussed. I wasn't surprised when a claim was actually brought to fruition by means of a lawsuit.

Q Who decided which of the many claims would be asserted in this case?

MR. SHAW: Objection, your Honor.

THE COURT: Let's get one or two questions and get this out of the way.

MR. SHAW: I can't see the relevancy. This is the operation of the law firm.

THE COURT: Not necessarily. Let's get an answer to that.

(Question read.)

A I don't know.

Q Do you happen to know what was in the complaint when it was first brought? Did it include one claim or more than one claim?

MR. SHAW: Objection.

MR. GRUTMAN: Irrelevant.

THE COURT: Overruled. Did you know whether it had one claim or more than one claim when you first learned of it?

THE WITNESS: I believe it had one claim when I was aware of it.

Q Which claim was that?

A That was the Neuburger, Loeb & Company, Inc. as assignee of the Buckley claim.

Q At what point in time did you approve that action? If you don't know I will go on.

A How many days did I have to object? I never objected to it. I do approve of the action.

Q When did you learn of it?

A I don't recall. It was some time during 1971. When exactly I just don't know.

THE COURT: Let's go on.

Q You personally were interested in having the proposed deal for the sale of the assets go through, were you not?

A I don't know what you mean.

Q Well, I mean that you had a personal stake in having the transfer agreement go through and you wanted it to go through?

A I received my personal stake the night of the closing. I never knew what it would be before that.

MR. MANDEL: I move to strike.

THE COURT: Strike it out.

Q Please answer my question.

A I wanted to see the deal go through, yes.

Q When I asked you in deposition on page 96, line 14:

"Q Were you interested in having the proposed transfer of assets go through?

"A Certainly," is that correct?

A I don't have it in front of me but I will take your word for it, Mr. Mandel.

Q How much stock did you get in the new corporation?

A About 1 per cent of the total outstanding.

Q About 3 per cent of the controlling stock?

MR. GRUTMAN: Objection.

A I answered your question.

Q What? Did you get about 3 per cent?

A I think it was closer to 1 per cent of the total outstanding once you had the conversions and once you took into account the conversions and everything else.

Q How much did you pay for that stock?

A $10,000.

Q Did you sell that stock one year later?

MR. GRUTMAN: Objection. I fail to see the relevancy of what the terms of the sale of the stock were. They have nothing to do with the validity of the transfer or an issue here.

MR. MANDEL: It ahs to do with his motives.

THE COURT: Overruled.

Q Did you sell your stock one year later, thereabouts?

A Yes.

Q What was the selling price?

MR. SHAW: Objection unless it is established that at the time of the transfer he knew he was going to sell the stock a year later.

THE COURT: Overruled.

A I am sorry?

THE COURT: What did you sell it for a year later?

THE WITNESS: I sold the stock for $70,000.

MR. MANDEL: No further questions.

CROSS EXAMINATION

BY MR. SILFEN:

Q Mr. Berkowitz, both on direct examination by Mr. Shaw and on some examination by Mr. Mandel you were asked about your relationship with Fred Kayne. Could you tell us whether or not at any time prior to August or September of 1970 you knew Fred Kayne?

A No, I did not. I believe I met Fred in August.

Q August of 1970?

A Yes.

Q Could you tell us the circumstances under which you became employed by Neuburger, Loeb, that is, did you contact Mr. Kayne or did he contact you?

A I was friendly with Mr. Kayne's younger brother.

Q That is Rick Kayne?

A That is Richard Kayne, correct.

I had never met or seen Fred Kayne until Mr. Richard Kayne told me one day that "Fred may have something of interest for you. Would you like to speak to him?"

Q I think we have established at this time that in August of 1970 you were unemployed?

A That is correct.

Q I think you told us that you became employed by Neuburger, Loeb, the partnership, on November 3, 1970.

A That is correct.

Q During this period, August of 1970 to November 3, 1970, did you seek employment other than with Neuburger, Loeb, the partnership?

A I don't believe so.

Q You did not?

A I was studying for the California bar and I was not seeking employment anywhere.

Q When was the first time that you communicated with Mr. Fred Kayne after the suggestion was made from his brother Rick?

A Some time in early August, I believe.

Q Was that a telephonic communication, if you can recall?

A I believe so.

Q Where was Mr. Kayne, if you know, at the time of that telephone conversation? That is, was he in the State of California, the State of New York or some other state?

A I believe California.

Q Did you meet with Mr. Kayne in California or were your dealings with him over the telephone?

A I met with him in California.

Q Do you know whether or not after your meeting with Mr. Kayne in California Mr. Kayne remained in California or whether or not Mr. Kayne went to New York?

A I believe he went to New York.

Q Other than this one meeting in California did you have any other meetings with Mr. Kayne in California prior to the time that you became employed by Neuburger, Loeb, the partnership?

A Not in California, I had no other meetings with Mr. Kayne.

Q Did you have any meetings with Mr. Kayne in New York?

A Yes, I did.

Q Could you tell us when that meeting or meetings took place and whether anybody else affiliated or associated with Neuburger, Loeb, the partnership, was present?

A Yes. Mr. Kayne arranged for me to come to New York in September to have my prospective employment approved by the partnership and the people working at Neuburger, Loeb. I went to New York at his behest and met with Mr. Risher, Mr. Frank, the Neuburgers and Sterns and I was there for two or three days, I believe. It may have been in October and not September. I think my going in was in October.

Q Did you then return to continue studying for the California bar?

A No, the bar was over.

Q Did you have any employment, let's say, from the time that you terminated studying for the bar and your working for Neuburger, Loeb on November 3rd?

A No. I had several opportunities and I did not choose those.

Q A time came when you did come to New York, I think you told us, November 3, 1970 to resume your duties?

A That is correct.

Q From the time that you got to New York, let's say, for the first 15 days, do you recall having any meetings with Mr. Kayne and any other people involved in the Neuburger, Loeb partnership?

A I remember a number of meetings with Mr. Kayne. Generally they were at my behest and I had one particular meeting with Mr. Kayne in which he indicated to me that he was going back to California and that he had not been able to do what he thought he could do in raising and reorganizing the firm and raising capital and was going back to California and was very sorry that he had brought me there, sorry for me he had brought me there under these circumstances and I was in effect on my own.

Q Did you then become aware at any time that Mr. Fred Kayne had in fact withdrawn from the Neuburger, Loeb partnership?

A Yes, I was aware that he had withdrawn.

Q Can you tell me when did you first have this awareness, if you can just give us the chronology?

A It would have been early November.

Q Did a time come when Mr. Fred Kayne did in fact return to the State of California?

A November 17th.

Q Mr. Kayne then returned to California?

A No, he did not. His wife was quite ill and I think he went on a trip with her to the Bahamas first before he went back to California. I don't know how long the trip lasted; perhaps two weeks. The date he left was I believe the 17th of November.

Q Did Mr. Kayne, to your knowledge, return to the Neuburger, Loeb partnership at any time after November 17, 1970?

A No.

MR. MANDEL: I object to the form of the question because it is ambiguous. I have no objection if Mr. Silfen says to be able to become a partner again.

MR. SILFEN: No problem.

A In either case the answer is no.

Q You were asked several questions about a series of meetings and negotiations and activity that took place during the months of December, 1970, January, 1970 and up until February, 1971.

Now I ask you: was Mr. Fred Kayne present at any meeting that you were present during the month of December, 1970?

A I don't think so.

Q Did you have, to the best of your recollection, any telephonic conversations wi th Mr. Fred Kayne during the month of December, 1970?

A I am sure I did.

Q Do you recall, sir, whether or not the substance of any of those telephonic communications had to do with anything, with either Charles Gross, Jeanne Donoghue or Mabel Bleich?

A Absolutely not.

Q During the period of time that Mr. Fred Kayne was in New York, let's say, from November 3, 1970 until November 17, 1970, did you have any meetings, conferences or discussions with Mr. Fred Kayne of and concerning Charles Gross, Jeanne Donoghue or Mabel Bleich?

A No. There was the conversation with Mr. Kayne during that period that took place in the steam room at the New York Athletic Club right when he was going back in, which he indicated that he would like me to come back with him to California if I would and start a hedge fund with him.

Q You had also been asked about meetings that may have taken place in January of 1971 and before the date of the so-called transfer agreement on February 11, 1971. Do you know whether or not Mr. Fred Kayne was present at any of those meetings that took place in January and prior to February 11, 1971?

A I think he was.

Q Do you recall specifically which, if any, of those meetings Fred Kayne was present?

A No, I don't.

Q Do you recall having any conversations with Fred Kayne during the months of January of February, 1971 of and concerning Charles Gross, Mabel Bleich or Jeanne Donoghue?

A I don't think I ever discussed them.

MR. SILFEN: No further questions.

REDIRECT EXAMINATION

BY MR. SHAW:

Q Have you ever been a member of a conspiracy to bring a baseless claim against Mr. Gross, Mrs. Bleich and Jeanne Donoghue to force them into signing a transfer agreement five years ago?

A Absolutely not.

MR. MANDEL: I object to the form of the question.

MR. SHAW: Somebody has to ask him that question.

Q Did you at any time have the state of mind that the claim being asserted against Gross, Bleich and Donoghue has no merit whatsoever?

A No.

Q Did you at any time agree with one or more persons to assert a baseless claim against these people to coerce them to do anything?

A Absolutely not.

MR. MANDEL: Objection.

THE COURT: Strike the answer. Sustained as to form.

Q How much was that new capital in the corporation?

A The subordinated loan was approximately $1 million and then there was another 50 or 60 thousand in cash from the new shareholders and those were the capital contributions made, I believe.

Q And a year later when you sold your stock in the corporationwas the New York Stock Exchange threatening to put the corporation out of business?

A No, the corporation was prospering.

MR. MANDEL: That is not relevant.

MR. SHAW: Of course it is. If there is going to be a comparison we should know the circumstances, at least some of them.

THE COURT: I will permit it.

Q And a year later was Charles Gross the managing partner? Was he running the business of the corporation?

A No.

Q You testified with respect to various other claims that came to your attention in addition to the Buckley claim. Did they come to your attention? And I think you indicated that Ned Frank told you these things, correct?

A For the most part, Mr. Frank was the one who informed me of the other claims.

Q Was Ned Frank -- and I use the word because he is presently dead; correct, he died many years ago?

A I don't know when he died.

Q Was he formerly an assistant United States attorney for the Southern District of New York?

A That is my recollection.

MR. MANDEL: I object to that. It is irrelevant and meant to be prejudicial.

THE COURT: I will permit it to stand.

BY MR. SHAW:

Q Did he indicate to you what he had done in an effort to determine what was going on and what he had learned about these claims?

A Yes, he did.

Q What did he tell you?

A Is there any particular order you want me to take them in?

Q Start at the top.

A He told me that Mr. Gross had been responsible for some illegal and unauthorized trading of the Neuburger, Loeb partnership account --

MR. MANDEL: I am going to object only

to this extent: that the jury should be instructed that this can bear on the mental state of mind of this witness but is not evidence of the truth of the statements.

MR. SHAW: Having been brought out, it is relevant for all purposes.

THE COURT: No. I will so instruct.

Ladies and gentlemen, this is being admitted only for the purpose of eliciting for your knowledge what Mr. Berkowitz was told. This testimony is not proof of the truth of the contents of what he was told. Do you follow my instructions?

This is not testimony as to the underlying facts, this is merely that he was told something.

Go ahead.

A Particularly with respect to security of City Investing Corporation.

I was also --

Q What were you told about City Investing Corporation?

A That Mr. Gross had made unauthorized transactions on behalf of the partnership's account and had, in the securities of City Investing Corporation, resulted in substantial losses for the partnership.

Q Go slowly. In what sort of an account?

A The firm's own trading account.

Q Did he tell you anything more about this account?

A Well, it's been a long time. He indicated to me that Mr. Gross had tried to place the transactions or to instruct the -- he had ordered them to place the transactions in such a manner that the other partners would not know of the trades.

Q Did he use the word "secret"?

THE COURT: No, Mr. Shaw.

MR. SHAW: Withdrawn.

THE COURT: Let's leave the witness alone until he is finished telling you what he was told and we will see if there is any more necessity for further questions.

Q In addition to that trading account what did he tell you?

THE COURT: What else did he tell you? When you are finished with everything you can remember you tell us. Until then nobody says a word.

A He also indicated to me that Mr. Gross had been the prime mover in having the company acquire new office space in a building to be built which involved perhaps six or seven million dollars, a 20-year lease commitment, and when the fortunes of the firm started to turn sour the developer of the building had coincidentally offered Mr. Gross an out on the lease and payment of $100,000 if we would release the lease, and Mr. Gross turned it down.

I did hear Mr. Frank repeat this conversation in the presence of an attorney for Mr. Atlas.

THE COURT: What did he tell you?

THE WITNESS: He told me that Mr. Gross had turned down Mr. Atlas' request for the release of the lease in exchange for Atlas giving Neuburger, Loeb $100,000. I was told this at a time that Neuburger, Loeb now had to settle with Mr. Atlas for about $400,000 at a future date.

THE COURT: Strike out I was told at a time and so forth. Let's get the conversation in which you were told.

Mr. Frank had a conversation with you?

THE WITNESS: That is correct.

THE COURT: Run it out to the end, please.

A Mr. Frank indicated that it was rather ironic that we were now walking to Mr. Atlas' lawyer's office with a major check in our hands to try to settle the case when just a short period of time ago Mr. Atlas had offered to pay us, meaning Neuburger, Loeb & Company, to get out of the lease.

Q What else did he tell you?

THE COURT: You haven't yet indicated that you have run out. Have you run out on your recollection?

THE WITNESS: On the lease recollection that is approximately what I can recall of my conversation with Mr. Frank.

Q Would you go on.

A Mr. Frank also indicated to me that Mr. Gross was the party primarily responsible for the firm's purchase of the Buffalo Braves basketball team and that he had hoped upon the acquisition of the Braves that the firm could immediately turn around, have an underwriting and sell out its position or sell out a substantial part of the position and recover its costs and make a profit on a turnaround similar to the transaction that had just been consummated by the Seattle Supersonics management, and that when that -- when there was no underwriting to take the Buffalo Brave company public and distribute the shares to the public and the partners had to stay with the bank loans, then Mr. Gross had been instrumental in having customers' own securities pledged for the partners' personal loans at banks.

The New York Stock Exchange eventually found this, which was a violation of various exchange rules on hypothecation --

THE COURT: [illegible] strike that out.

A That the New York Stock Exchange had discovered this upon audit, said it was a violation of the hypothecation rules, and the firm had various capital problems as a result of this, and levied a fine against the firm of $25,000 or $50,000, and against Mr. Gross I believe there was a fine and censure.

MR. MANDEL: This is still what Mr. Frank told him?

THE WITNESS: Yes.

Q Would you go on?

A Mr. Frank further indicated -- that is what I can really recall of my conversations with Mr. Frank.

MR. SHAW: May I mark this an exhibit for identification?

(Plaintiffs' Exhibit 50 was marked for identification.)

x

Q I show you this piece of paper and ask you to look at it and ask you if it refreshes your recollection? That is with respect to one further thing you were told.

MR. MANDEL: Please.

THE COURT: Sustained.

Q Tell us if it refreshes your recollection.

A I remember seeing it before, yes, sir. I remember so many conversations.

THE COURT: Mr. Berkowitz, look at 50 for identification. Does that refresh your recollection as to anything else that may have been spoken about in this conversation?

THE WITNESS: Your Honor,this was not one conversation. This was a series of conversations.

THE COURT: Does it refresh your recollection as to anything further, yes or no?

THE WITNESS: Yes.

THE COURT: With your recollection so refreshed, what is your recollection?

THE WITNESS: The Lou Bracker affair.

THE COURT: What were you told by Mr. Frank as to that?

THE WITNESS: That Mr. Gross had the firm enter into a rather one-sided relationship with a promoter on the West Coast by the name of Mr. Lou Bracker without disclosing to the partnership what the total costs or conditions of the agreement with Mr. Bracker were, as a result of which the firm lost approximately $80,000.

I also recall the Simonoff and Peyser affair but I don't remember what I recall about it.

I remember a conversation -- yes, I do. Mr. Frank told me that Simonoff and Peyser -- I believe they are an accounting firm, and I believe Mr. Frank told me that they were Mr. Gross' personal accountants, and that he had had them do some work on the firm's behalf, I believe in relation to the One New York Plaza lease, and that there was a $23,000 accounting-bill rendered as a result of the services, which was still around when I got there and was finally compromised for a lesser amount and the bill could not be justified.

The names are ringing bells.

Q Let me ask you this question: Can you recall during any of these meetings during December, 1970 and January and February of 1971, wherein these various claims were being discussed on the part of the partners against Mr. Gross, Mr. Gross asserting or making a demand on his part against the partners?

representative or anybody in his behalf said or threatened anything if he didn't get his capital back?

A I never met Mr. Mandel, spoke to Mr. Mandel or saw Mr. Mandel until my deposition in December of 1971.

Q Your attention was directed to Exhibit P. Is Exhibit P a document that was insisted upon by the limited partners?

A Yes.

Q Were you present at any conversations with limited partners or their attorneys where they made this insistence or demand?

A I am not sure about this particular demand that got reduced to this agreement but, yes, I was present at meetings at which the limited partners expressed the belief that Mr. Gross should not be treated differently than they are being treated or they were being treated and would not go along with the deal unless that was agreed to.

Q Did the limited partners receive stock in the corporation?

A I don't remember.

Q Did any of the limited partners receive cash?

companies less than two months at that point.

Q During November of 1970 did the partnership have a net income?

A I have no idea what the profit and loss was during that period.

MR. SHAW: Nothing further, your Honor.

RECROSS EXAMINATION

BY MR. GRUTMAN:

Q At the time that you acquired the stock which you did in Neuburger, Loeb & Company, Incorporated did you have an arrangement at that time to sell it?

A Of course not.

Q Did you know that you were going to sell it at all?

A Not that I was going to sell it. I knew that I was going to be leaving the firm at the end of 1971 and return to California.

Q But you didn't know whether you would be selling your stock or not?

A I assumed I would be keeping it.

Q At the time that you acquired the stock what was its actual value?

MR. MANDEL: I object to that.

THE COURT: Yes, sustained.

Q What was the book value of the stock?

MR. MANDEL: I object to that.

THE COURT: What is the relevance of this? He paid $10,000 which establishes value to him.

MR. GRUTMAN: It establishes the purchase price, not the book value. It doesn't establish whether it has a negative or positive value.

THE COURT: That is what he was willing to pay for it. Objection sustained.

Q Was there a New York Stock Exchange requirement, Mr. Berkowitz, that you own $10,000 worth of stock --

A That you had to invest $10,000 worth of stock.

Q Whether that stock was worth it or not, is that correct?

A Right.

THE COURT: Strike that out.

Q Was there a requirement that for you to hold the position in Neuburger & Company, Incorporated you had to invest $10,000 in money in the stock of the company?

A That is correct.

THE COURT: I will permit that answer to stand.

Q During the period of time that the negotiations were going on and which culminated in the transfer agreement was part of your activity devoted to dealing with the regulatory agencies?

A Almost exclusively.

Q When we speak of the regulatory agencies was the Securities and Exchange Commission one of the regulatory agencies with which you dealt?

A Yes, I did.

Q I show you a document dated January 20, 1971. Would you look at that document and tell me whether or not you recognized it?

A Yes.

THE COURT: Mark it for identification.

(Finley, Kumble Exhibit G was marked for identification.)

MR. GRUTMAN: The document has some underlinings on it which are mine, your Honor.

I offer it in evidence, your Honor. I am offering the document to show there was disclosure made to the Securities and Exchange Commission by Neuburger, Loeb of the provisions of the transfer agreement. It was all done in the open.

MR. MANDEL: That is irrelevant.

THE COURT: I think the record can establish that a copy of the draft agrement was sent to the Securities and Excchange Commission.

MR. GRUTMAN: Yes, with this.

THE COURT: I will sustain the objection to the letter and I will permit this witness to say that a copy of the proposed draft agreement was sent to the SEC, period.

Q You are shaking your head, Mr. Berkowitz. Was something sent to the SEC?

A I know the letter was. I don't know if we sent a copy of the agreement.

THE COURT: I sustain the objection to the letter.

MR. GRUTMAN: To the letter?

THE COURT: Yes. What counsel says to the SEC in the letter doesn't bear any relevance to the issues here.

Q Did the SEC ask you any questions about the proposed transfer?

MR. MANDEL: Why is that relevant?

THE COURT: Sustained.

Q Did you ave to get SEC approval for the stock exchange?

A Yes.

Q Did you get the SEC approval?

MR. MANDEL: Objection.

THE COURT: I will permit it.

Q Did you?

A Yes. The letter was published in the Commerce Clearing house.

Q Did you send a copy of the transfer agreement --

THE COURT: Mr. Mandel is arguing to the contrary here.

MR. MANDEL: Your Honor, I believe that the record is being prejudiced. The SEC does not approve transfer --

MR. GRUTMAN: That is a subject for cross examination.

MR. MANDEL: It does not approve this agreement. The SEC has nothing to do with the dispute that is before this court. The only thing that the SEC --

THE COURT: Is it urged by you that they did, that the passed upon this dispute?

MR. GRUTMAN: They passed on the validity of the transfer agreement and the propriety of the conversion of the partnership into the corporation in the form in which Finley, Kumble --

THE COURT: What basis?

MR. GRUTMAN: There is a question here about the good faith of Finley, Kumble. There was nothing done in the corner or in the dark.

THE COURT: The question is the timing of this. Did the SEC proceed on the basis of the events of the evening of February 11th or some earlier matter?

MR. GRUTMAN: Prior to the event of the evening.

THE COURT: I sustain the objection.

MR. GRUTMAN: Even though the SEC was advised?

THE COURT: The SEC was not involved in the events of the evening of February 11, '71.

MR. MANDEL: Mr. Grutman should be cautioned against saying in front of the jury you sustain the objection.

THE COURT: He didn't hear me and now he hears me.

We are going to recess for the night.

MR. GRUTMAN: Can we have a discussion after the jury leaves?

THE COURT: Yes. Tomorrow is Friday, 10 o'clock, and we will sit until 1. You will be off in the afternoon. I have other cases in the afternoon.

(The jury left the courtroom.)

MR. MANDEL: The SEC knows nothing of this dispute, has no jurisdiction of this dispute, nothing that it did ever bother on this dispute.

THE COURT: I am not shown anything to the contrary. Let me hear from the other side.

MR. SHAW: Can I make a statement?

THE COURT: Mr. Grutman is bursting to speak.

MR. GRUTMAN: I would like to speak but I would hope your Honor would hear Mr. Shaw. The purpose for which I offered the document that you have presently excluded is to show that at the time that Mr. Mandel on behalf of his client suggested there was a conspiracy afoot there was complete disclosure made to the Securities and Exchange Commission of the structuring of the proposed new corporation following which, and after the submission of the transfer agreement to the New York Stock Exchange, the New York Stock Exhange approved the organization of Neuburger, Loeb and Company, Inc. with knowledge that Bleich and Donoghue had not signed and they sent to Neuburger, Loeb on February 16th a letter expressing their delight and approval of the of the board of governors at its meeting on February 11th for the admission of Neuburger, Loeb, Inc. as a member corporation.

THE COURT: They are not the triers of the fact as to the issues that are raised in this court-courtroom.

MR. MANDEL: Or the law.

THE COURT: I sustain the objection.

MR. GRUTMAN: While you may say that Finley, Kumble's opinion about Section 98 was, as you have indicated earlier, our good faith and the way in which we conducted ourselves, the openness, the candor, the public scrutiny for which we held up the activity with which we are a part is relevant on the issue of our good faith, whether we were right, as we believe we were, or wrong, as somebody else might hold. As your Honor has said, reasonable men may hold different opinions from that held by our firm. It's indispensable for us to show the absolutely broad way in which we were going about this.

THE COURT: Where is it that shows that the SEC passed upon this transfer agreement as being valid under Section 98 of the partnership law?

MR. GRUTMAN: That is not specifically a question --

THE COURT: That is what we are litigating here.

MR. SHAW: The only thing I know that would bear on that would be that the New York Stock Exchange, which was well aware of the fact that Bleich and Donoghue were not giving their consent, did--

THE COURT: What shows that?

MR. SHAW: There is correspondence which I have seen which will be offered in evidence which will show that the New York Stock Exchange was well aware of these issues and passed upon and approved and admitted the corporation to membership to the New York Stock Exchange despite all these things.

MR. GRUTMAN: Mr. Dilger of the New York Stock Exchange was at the closing.

MR. SHAW: If this was a conspiracy it was conspired and acted upon and all the deeds were committed in broad daylight and I think it's relevant on that point.

THE COURT: At this point all that I have before me is this offer of Exhibit G.

MR. GRUTMAN: And here is Exhibit H, which is the companion document.

MR. SHAW: We have Xeroxed 500 pages from the records in the New York Stock Exchange, to be exact, 490. [illegible]s in there.

MR. BERKOWITZ: The SEC responded to the letter,and my letter and the SEC letters are published in the Commerce Clearing House.

THE COURT: I will reserve decision.

MR. MANDEL: May I be heard on this?

THE COURT: I thought you had.

MR. MANDEL: I haven't been able to answer them. The New York Stock Exchange is not a general judge or abiter of everything that is done and whether it is done correctly or not, nor does it decide contractual disputes between partners and ex-partners. We don't say that the conspiracy was they didn't tell the New York Stock Exchange or they didn't tell the Securities and Exchange Commission. We say they got together to cook up and a bunch of phony claims and to override the law,and the New York Stock Exchange, insofar as it saw anything, saw Mr. Persky's opinion and they knew nothing beyond that. It didn't attempt to judge it.

The SEC had nothing to do with the matter. All the New York Stock Exchange said is that in setting up your books we know there is a claim. We don't want to be the judge of it. You set up a reserve of $300,000 for Bleich and Gross and Donoghue which show on your books. How could the New York Stock Exchange say there is no conspiracy or how could the fact that the New York Stock Exchange knew that we were taking this position that we were entitled to the money?

THE COURT: Is it acknowledged that the exchange required Neuburger, Loeb to set up a reserve for Mr. Gross and the Bleich-Donoghue claim?

MR.GRUTMAN: Yes, we did and its carried in the balance sheet.

THE COURT: That indicates that failure to give approval or disapproval, I would think. They treated this as a contingency and did not say yes, that is fine or not.

MR. GRUTMAN: They felt the actions we took were appropriate and that it was permissible for Neuburger, Loeb and Company, Inc. to come into existence and trade as a member on the exchange and the point I am making is not whether they were right or we were right but that what we did was open, aboveboard, candid, disclosed. It was in good faith.

THE COURT: If this went into evidence I would consider allowing it in evidence if you will permit a showing that the exchange required a $300,000 reserve.

MR. GRUTMAN: I want to offer that because we put up the money.

THE COURT: A contingency for Mr. Gross' claim.

MR. GRUTMAN: We insist on doing that.

MR. MANDEL: The confusing point is this, your Honor. They say the fact that we told the New York Stock Exchange that there were these claims proves there is no conspiracy.

THE COURT: They say that is some evidence that there was no conspiracy.

MR. MANDEL: It's a question of what the conspiracy is. We say that the conspiracy was to abuse the settlement and to assert false claims against my clients to hold off paying the money that they owed them. The New York Stock Exchange and the action of the Securities and Exchange Commission have absolutely nothing to do with any of this. This is a little bit like what the Securites and Exchange Commission tries to stop when they say don't you dare put on the prospectus that we have approved of this.

THE COURT: I am going to consider this overnight.

In connection with our next witness can somebody -- and this need not be on the record.

(Discussion off the record.)

(Adjourned to June 27, 1975, at 10:00 a.m.)

JQjw 1

NEWBURGER, LOEB & COMPANY, INC.

vs.

CHARLES GROSS, MABEL BLEICH and
GROSS & COMPANY,

71 Civ. 685

-and-

NEWBURGER, LOEB & COMPANY, et al

June 27, 1975
10:00 A.M.

(Trial resumed)

(In open court - jury present)

MR. SHAW: Mr. Grutman has not arrived. I think it was his point to examine. Perhaps one of the other counsel can begin their examination of Mr. Berkowitz.

LAWRENCE J. BERKOWITZ,

having been previously duly sworn, resumed the stand and testified further as follows:

RECROSS EXAMINATION

BY MR. ESTERMAN:

Q Mr. Berkowitz, when we focus on the time when you were reviewing the file with respect to the Buckley claim and at that period in time were you the intermediary or liaison man between Newburger, Loeb and the Finley

Kumble, Persky firm?

A Not by formal designation but, yes, as house counsel I would be dealing on all matters of legal matters with the Finley, Kumble firm.

Q So that any discussions or any problems that arose in connection with any legal problems you and Mr. Persky would have conversations?

A That is correct.

Q Would there also be an exchange of correspondence when necessary?

A When necessary, yes.

Q At the time that you were reviewing the Buckley file, did you know Mr. Gross or Miss Bleich or Mr. Donohue?

A I knew Mabel Bleich as a registered representative at Newburger, Loeb and as a limited partner.

I have never then and still have never met Miss Donohue and I met Mr. Gross on June 24, 1975 when I walked into the courtroom.

Q Had you heard the name Gross & Company other than from that file you were reviewing?

A No, I had not.

Q So that at that time when you and Mr. Persky, I believe you testified, had some conversations regarding what was revealed to you in the Golenbock & Barell file regarding the Buckley claim --

A Let me correct you. I did not see the Golenbock & Barell file. I knew the Newburger, Loeb file which was really our compliance file which contained many of the things in the Golenbock & Barell file I assume.

Q Including some papers relating to what we have been characterizing the Buckley claim?

A That is correct.

Q Therefore it is true, is it not, that the discussions you had and the time that you had them regarding the Buckley claim with Mr. Persky you had no knowledge of the parties other than what you just described?

A That is correct.

Q After reviewing the files that you described on your previous testimony, after reviewing them, did you have a view at all with regard to the Buckley claim itself?

A Yes.

Q Your own view.

A Most definitely. My view was, one, that the Newburger, Loeb claim for money damages as a result of the Westec trading loss was substantially less than Newburger, Loeb anticipated it would be.

In addition, I believed that there was a claim against, a churning claim by the Buckleys versus Newburger, Loeb was being brought against the wrong party and I felt that there was, a decent or more than decent basis for stating a churning claim by the Buckleys against whomever they stated it again.

Q On what did you base your determination that the claim was brought against the wrong party?

A The originating broker, the broker who is responsible for the Buckley account, by that I mean the Buckleys were clients of Gross & Company, the registered representative in charge of the account was Mr. Jordon, an employee of Gross & Company.

Gross & Company under no -- cannot legally delegate its authority to supervise its salesmen's activities to Newburger Loeb. It is under the Exchange regulations and SEC, under the '34 Act of the Securities and Exchange Act of '34 it is illegal. They could not delegate authority to supervise.

MR. MANDEL: Will your Honor instruct the jury that this testimony should be taken by them only as to this man's opinion at the time and not to be taken by the jury as a statement of what the law is. Otherwise I am not objecting.

THE COURT: Given that you do not object.

Ladies and gentlemen, this is what Mr. Berkowitz understands the law to be, not necessarily what it was. It may be or may not be. We are only accepting this testimony as to what his understanding was at the time.

Go ahead.

A Therefore, on the basis of my conclusion that Gross & Company was the party responsible for supervising the account any churning claim would by definition have to be brought against Gross & Company.

Q Did you have any discussion regarding what you just told us with Mr. Persky?

A Yes, I did.

Q At the time that you were reviewing this Buckley file and at the time that these things that you just discussed took place in your own mind and with Mr. Persky, were you aware of the financial condition of Newburger, Loeb at the time?

A Yes.

Q What was that condition?

A I knew that Newburger, Loeb was in extremis, dire financial condition, that its capital had been eroded, that there were notices of further withdrawal of capital, that the Exchange had indicated that they were about to take action to either liquidate the firm unless additional capital were brought in and I knew that the general partners' efforts to bring in additional capital had failed for the most part.

Q Would you say that part of your duties as being part of the Newburger, Loeb firm was in effect to attempt to see where you could recover for any valid claims which Newburger, Loeb may have had in order to raise the capital, increase the capital?

A Yes.

In addition, I felt that if there was any claim that could possibly be used by Newburger, Loeb in a bankruptcy situation that that also had to be taken into consideration. We had to marshal assets.

Q It was with that view that you told us about what you did in connection with the Buckley claim?

A That is correct.

Q You had testified I think yesterday with respect to the closing on February 11th of 1971 and without going into all the details, can you give me an idea of how long that closing took?

A I believe the closing started on the evening of February -- correct that. It started during the day, the afternoon and morning of February 11th and continued through the night of February 11th until perhaps two or three or four o'clock in the morning of February 12th.

Q Can you tell us as close as you can approximately how many people participated in this closing?

A I arrived at the offices of Finley, Kumble where the closing was taking place around six, seven o'clock in the evening, I believe. From that point until the end I guess there were perhaps thirty people, thirty-five people.

Q In that group would you say that included lawyers as well as parties?

A Yes, that is who was participating, lawyers, principals.

Q And there were different or divergent groups represented, were there not, in that closing, because there were different parties, general partners, subordinated lenders?

A Yes.

Q And all represented by different attorneys?

A Some of the parties had the same. For example, Mr. Bialkin represented three subordinated lenders. I believe that some other attorneys represented one or more, more than one limited partner or general partner.

Q Would you be able to estimate or characterize for us or describe for us the volume of documents that were involved here?

MR. MANDEL: Your Honor, we have the file and I think that is the best evidence.

THE WITNESS: That is not true.

MR. ESTERMAN: I believe this witness should be permitted to testify as to what he knows about what took place at the closing.

THE COURT: Yes, go ahead.

A As Mr. Mandel has indicated, there was just by virtue of the size of that file an enormous amount of paper to make up that one file.

When you take into consideration that each party had to sign that document you begin to realize how many copies of that document and others were floating around the room. It was an enormous amount of paper.

Q So that this bound volume that his Honor has just held up and that we have been talking about as being the closing binder, were there copies of that for everyone in the room?

A I don't believe there were copies of the bound volume itself for everyone in the room, but most of the papers in that everyone signed as an original.

Q And the procedure was -- well, can you describe it generally, what did they do, pass the documents around?

A Well, I think what they did was they started with each document, each document comprising this file and would take it one at a time on an agenda. There was an agenda, a list of which ones would be considered in which order.

They would take that one document, read it for comment, make corrections, retype it and then circulate many copies around the table for signing or for review and then go on to the next.

Q You mentioned corrections and retyping.

How does that occur? Why was that necessary?

A Well, as I indicated you have probably sixteen or seventeen different law firms represented by maybe twenty lawyers or twenty-five lawyers each one of them is being paid by that client sitting next to him, he is going to make his comments before he makes the client sign.

MR. GRUTMAN: I apologize for coming tardy and I apologize to the jury as well.

THE COURT: Very well.

A There were commas being corrected, typos here, typos there.

Q Were there also substantive changes perhaps?

A There were some, yes.

Q Ultimately did everyone agree on the document that was ultimately signed?

A Everyone who signed it certainly.

Q In addition to the mechanics of passing these documents around, was there much discussion regarding any of the documents with the lawyers and the parties?

A Constant, yes. There was a constant discussion of each document and sometimes after it was reviewed they would go back over it again and discuss and talk and break out into little groups to talk about various parts of the particular document that may affect an individual.

There was jokeying and positioning and negotiating going on I believe right up until the moment each document -- as each document was signed.

THE COURT: Let me ask you, Mr. Esterman, in terms of what you want to establish for your case, have you got enough detail of this closing at this point? I am not quite clear as to why we need to get all this detail.

MR. ESTERMAN: From this witness, yes, your Honor.

THE COURT: Then go on to something else, if you can.

MR. ESTERMAN: I am almost through, your Honor.

Q I would like to ask just one question with respect to the closing and I will leave that subject.

In your opinion, as a result of what you just told us, was there any withholding by anyone of any information at this closing?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q Was there any conspiratorial attitude taken at the time?

A Absolutely not.

THE COURT: Sustained and strike out the answer.

MR. ESTERMAN: I have no further questions at this time.

RECROSS EXAMINATION

BY MR. GLATZER:

Q You testified you were general counsel for the partnership for a period of time.

Did you have any other relationship to the partnership other than general counsel?

A None at all.

Q You were not a partner or a limited partner or a subordinated lender?

A I was not.

Q On the night of the closing, February 11, 1971, did you sign the transfer agreement?

RECROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Berkowitz, yesterday you told us that you sold your stock in the Newburger, Loeb corporation and you told us the price you received.

In connection with that sale, isn't it also true that you asked for and received an agreement to be indemnified against your personal liability asserted against you in this case?

MR. SHAW: Objection, your Honor.

THE COURT: How is that relevant?

MR. MANDEL: That is an extrajudicial admission that this witness considered these charges serious enough so that in negotiating a $70,000 sale of stock he asked somebody else to say I want you to take, pick up the tab if I am held liable to pay Mr. Gross and Miss Bleich and Miss Donohue and the other parties consented to do it. It is an extrajudicial admission.

MR. SHAW: It is not an admission of anything.

MR. MANDEL: It is also a function of price.

THE COURT: I will reserve decision on that. Go on to another subject.

Q Mr. Berkowitz, you testified yesterday, am I right, that what you bought was about one percent of the stock, is that correct?

A On a fully diluted basis I believe it's around there.

Q I ask you whether or not in your deposition in December of 1971 I asked you these questions and you gave these answers at page 4 line 6:

"Q How about the corporation?

"A Well, I am a principal of the corporation and an employee in the sense that I am general counsel of the corporation, officer, director, general counsel, secretary.

"Q Are you a stockholder in the corporation?

"A Yes, I am.

"Q How much stock do you own?

"A Percentage-wise or number of shares?

"Q Number of shares first?

"A 35,000 shares.

"Q And what percentage of the issued and outstanding does that represent?

"A Approximately three percent.

"Q Of what class of stock?

"A Of all the voting and non-voting common."

Did I ask you those questions and did you give those answers?

A Yes, and they are perfectly consistent with what

I just said.

I said fully diluted. It is a conversion privilege given to various shareholders who took convertible securities and I say one percent approximately of the fully converted stock.

Q Those conversions never took place, is that correct?

A I have no idea, Mr. Mandel.

Q You spoke yesterday and answered some questions asked by our friend, Mr. Silfen, who is not here at the moment, about what happened to Kayne and I think you said there came a time when Kayne left New York and went to California.

I think you said that was when, November?

A I believe I testified that there came a point when Mr. Kayne went home. He was living in New York and he said I am leaving, I am going back to California, not just on a trip, he was leaving. That was on November 17th as I testified.

Q But he left New York but he did not leave Newburger, Loeb, did he?

A He still remained committed with Newburger, Loeb?

I believe he was a registered representative in the California office.

Q So he was still working with Newburger, Loeb, right?

A Yes.

Q And he was still a member of the new team seeking to get acquisition --

A Absolutely not.

MR. SHAW: Objection, your Honor.

THE COURT: Overruled. Objection to the characterization new team as defined by this witness in the deposition and the objection is overruled.

A As of November 17th it was my understanding from Mr. Kayne that all bets were off. There was no deal. He was leaving for that reason and I was about -- I was considering leaving myself and there was no team, at least that I was aware of and I am sure as far as Mr. Kayne was aware of otherwise he would not be going home. There was no deal.

Q And that suddenly happened, right? The deal was revised, right?

A No, something completely unrelated to that happened.

Q Mr. Berkowitz, without fencing, did there come a time when Mr. Kayne and Mr. Muh and Mr. Risher began negotiations again to take over the assets of Newburger, Loeb and a new corporation, yes or no?

A No.

Q What happened on February 11th?

A You asked me a question whether Mr. Kayne, Mr. Muh and Mr. Risher started negotiations again and I answered no.

Q Did negotiations start up no matter who started them?

A Yes.

Q When did that happen?

A About the middle of December at the meeting at Stroock, Stroock & Levan where there seems to be a revival of interest in the reorganization on the part of the limited partners and on the part of the general partners.

Q And after the revival, was Kayne a member of the new team?

A That is between Mr. Kayne and the new team. I am not aware of who they are.

Q Don't you know who did the negotiations and who acquired possession of the stock on February 11th?

A Mr. Mandel --

THE COURT: Please answer counsel's question.

A Can you repeat the question?

(Question read)

THE COURT: You either know it or you do not know it.

THE WITNESS: I am being asked several questions.

THE COURT: You are being asked one question as to whether you know who negotiated the Newburger stock.

THE WITNESS: No.

Q Did anybody get more voting stock that Kayne?

THE COURT: On February 11th, I take it. The answer is no, you know it.

MR. SHAW: Objection, your Honor.

A If you let me answer I would.

Two other people received the same amount Mr. Kayne did.

Q Risher and Muh and Kayne each got the same amount and between them they got the largest share of the outstanding voting stock after February 11th, on February 11th; isn't that right?

A Of course.

Q And they were the leaders of the new team; isn't that right?

MR. SHAW: Objection, that is argumentative.

THE COURT: Overruled.

A I don't know who led any new team. I really don't know the answer to that question. It's a question of who the general partners and subordinated lenders and limited partners were looking to.

THE COURT: You answered the question.

The question was who were the leaders of the new team.

Q Who were the directors of the new corporation?

A I testified yesterday that to the best of my recollection Mr. Robert Newburger, Richard Stern, Kayne, Muh, Risher, Sloane and myself were the directors.

Q Does that amount to seven directors, was my count; right?

A Seven.

Q And of those seven you -- by the way, did Sloane go back to California when Kayne went back to California?

A He never left California to begin with.

Q And Sloane and Kayne had been friends from California before that in Newburger, Loeb; right?

A I didn't know either of them, Mr.Mandel.

Q But you don't know. This is something you never heard of. You don't know as of today, is that what you are telling me?

A Are you asking me whether I heard Mr. Sloane and Kayne were friends in California, yes.

Q I am asking you --

MR. SHAW: Objection. The witness is not being given an opportunity to answer the question.

THE COURT: That is not the problem.

Mr. Berkowitz, please answer the question. I know you are a party but at this point you are a witness and your duty is only to give responsive answers to proper questions.

Let's hear the question.

(Question read)

A Yes, I knew that Mr. Kayne and Sloane were friends.

Q Didn't you also know that after February 11th Fred Kayne was Chairman of the Executive Committee and Chief Operating Officer of the Newburger, Loeb corporation?

A I believe that is the title, yes.

Q And he was part of the new team, right?

A He was the Chairman of the Executive Committee and Chief Operating Officer of the new corporation.

Q Yes.

MR. SHAW: I object to Mr. Mandel's comment, "Yes".

THE COURT: Do not comment.

Q And Mr. Muh was Chairman of the Board and he was from the new team; right?

A Mr. Newburger and Mr. Stern were old partners of the firm. Everyone else was new.

MR. MANDEL: I object and move to strike.

THE COURT: I will let it stand.

Q Answer my question.

THE COURT: He did.

Q Paul Risher was President and Director of the new corporation and he was from the new team?

A He was not previously President or Director of Newburger, Loeb, that is correct.

Q And you were Vice-President, Secretary and Director of the new corporation and you were from the new team?

A I was not Vice-President and Secretary before, that is correct.

Q You said yesterday something about why the stock or whether the Buckley-Westec stock had not been sold out and I think you said it was your opinion that the stock should have been sold out at the opening of trading, the reopening of trading in Westec in August of '69, is that right?

A No.

Q May of '69, do I have the date wrong?

A Yes.

Q May of '69.

Regardless of what anybody in Newburger, Loeb may or may not have done about that sale of stock, you knew, didn't you, that Gross & Company had nothing to do with the failure to sell that stock?

MR. SHAW: Objection.

THE COURT: Overruled.

MR. SHAW: This is specifically re-examination on an area that Mr. Mandel himself brought up where the witness testified that the decision not to sell the stock was made by Mr. Gross and now he is going over on recross what he brought out before on cross.

MR. MANDEL: No.

MR. SHAW: He is asking the same questions a second time.

THE COURT: I will hear from Mr. Mandel on that. Is this something that has been brought up?

MR. MANDEL: Mr. Berkowitz just spoke again this morning, I think -- I don't know whether it was in response to Mr. Esterman or somebody else, about the question of sale of the stock and the point that I am trying to make now since Newburger, Loeb or Gross & Company is the defendant here, that Gross & Company was already out of existence and could not have had anything to do with the decision to sell or not sell that stock in '69.

THE COURT: I do remember Mr. Esterman asking about whether he looked in the contents of the file at the time he gave it to Mr. Persky and what he said to Mr. Persky at that time.

I think at this point it is easier to overrule the objection and take the answer.

Let's have the question.

(Question read)

A No.

Q When you were talking to Mr. Persky, did he tell you that Gross & Company was still in existence in '69?

A No.

Q Did you ask him whether Gross & Company was in existence in '69?

A No.

Q Did you ask Persky who was responsible for the failure to sell out the stock?

A No.

Q Were you concerned with that question?

A I told Mr. Persky who I felt was responsible to sell the stock.

Q Did you tell Mr. Persky you felt Gross & Company was responsible for the failure of Newburger, Loeb to sell that stock in May of '69?

A At the time I discovered the Westec stock still long was before I had gone over the Buckley account and at that point in time I had no idea whether Gross & Company existed, didn't exist, when they existed or anything else.

It was several weeks later or a week or two weeks later when I went over the Buckley account that I realized that Gross & Company was the originating broken on that transaction involving Westec.

MR. MANDEL: I move to strike.

THE COURT: Strike it out.

Q My question to you, Mr. Berkowitz, is whether you told Persky that you felt that Gross & Company was responsible for the failure to sell out the stock of the Buckleys in Westec in May of 1969.

THE COURT: Did you tell them that or no?

THE WITNESS: I did not tell them that. I told them I thought Charlie --

THE COURT: All right, you did not tell them.

Q Did you say yesterday who ordered the stock to be sold finally? By that I mean the Westec stock in the

Buckley account that you said you gave those corrections?

A Yes, I did.

Q To whom did you give those corrections?

A I believe to Mr. Ed Rubin in the order room.

Q Do you remember the date that was done?

A No, I do not.

Q I show you part of Plaintiffs' Exhibit 8 and I show you a telegram dated November 11th.

I ask you if that refreshes your recollection in any way?

A No, it does not.

Yes, it does. Do you want me to continue?

Q Yes. As to what does it refresh your recollection?

A That there had been telegrams sent to liquidate the account but nothing was ever done about it. The firm had never executed the orders.

Q When were the telegrams sent?

A I have no idea except for that one.

Q What does that tell you?

A As I recall that said November 11, 1970. They warned the Buckleys on a margin call but never did anything about it. I am assuming too that Techsim was the prior name for Westec.

Q Yes, there has been testimony as to that.

Mr. Gross was not a partner in Newburger, Loeb & Company active as such during any time you were there, is that correct?

A That is correct.

Q And I think, do I understand your testimony correctly, that it was not just the Buckleys' Westec stock that Newburger, Loeb failed to sell out but that anybody's Westec stock that was in the house Newburger, Loeb had failed to sell out until you saw to it that it was done; is that correct?

A I don't know that is correct as a matter of fact.

Q Isn't that right?

A I know the Buckley stock was not liquidated and it was by far the largest position, by far. Whether any other Techsim or Westec stock had been sold at any previous time I really don't know. I only know what was there when I got there and sold it. I don't know what had been sold previously but I do know that the Buckley stock had not been sold at any time.

Q Did I misunderstand you a little while ago that you said there was this stock in a number of accounts and you ordered it all sold out?

Isn't that what you said or did I misunderstand you?

A All that was there, yes.

Q Do you recall that there was other Westec stock or Techsim besides the Buckleys'?

A That is correct.

Q Do you remember the amount of it?

A I don't.

Q Did anybody tell you who had prevented the non-Buckley Westec stock from being sold?

A Yes. Mr. Goldstein told me that Mr. Gross did not want that stock sold.

Q Any of the Westec?

A That is correct.

Q And you have no personal knowledge whether that is true or not?

A That is correct.

Q Do you know when Mr. Gross withdrew as a partner?

A I know his notice was effective before I ever arrived there so I would assume it would be sometime before November 1, 1970,but I don't know. I don't recall, as a matter of fact.

Q But even after Mr. Gross was gone the fact was, and this you do know of your own knowledge, that the Westec stock had not been sold?

A That is correct.

Q In November and December and January and February, and I am talking about 1970 and 1971, Mabel Bleich and Jeanne Donohue were still limited partners of Newburger, Loeb & Company; is that correct?

MR. GRUTMAN: I object to that as calling for a legal conclusion about which there is a dispute.

(Question read)

MR. SHAW: I also object upon the grounds this is not valid recross examination.

THE COURT: In what respect is this recross?

MR. MANDEL: They have gone into the events, Mr. Esterman did, of February 11th. I wish to go into the question of what he knew about their status on February 11th and what he felt his fiduciary responsibilities were to them as general counsel and I really should not have asked him were they still partners, but he did know and understand if they were partners.

THE COURT: If you put it that way I will overrule the objection.

MR. MANDEL: All right.

Q Mr. Berkowitz, you knew and understood that during November and December 1970 and January 1971 and

February '71 until February 11th Mabel Bleich and Jeanne Donohue were limited partners of Newburger, Loeb & Company?

A I certainly knew that they were limited partners until their notice of withdrawal. What the effect of that notice is on their status I just don't know. That is apparently a matter of contention. I rather not speculate on that now.

Q Did you have an opinion on that question at the time? Remember, you were general counsel of Newburger, Loeb.

A I don't recall having an opinion.

Q You don't recall whether you had an opinion one way or the other?

A I don't recall.

Q Do you recall that other limited partners had given notice of withdrawal and were asked to become signatories to the February 11th agreement?

A Yes.

Q And as general counsel of the partnership you approved of that, did you not?

A Approved of what?

Q The fact that other limited partners who had given notice of withdrawal prior to Bleich and Donohue were asked to become and became signatory parties to the February

11th agreement?

A I didn't approve or disapprove. I had nothing to do with it. They gave the notice and they signed the agreement. I didn't approve or disapprove.

Q You recognized as general counsel to the partnership that the partners of Newburger, Loeb & Company had a fiduciary obligation to Jeanne Donohue and Mabel Bleich during November and December of '70 and January of '71 and February of '71?

A That the general partners had a fiduciary obligation?

Q Yes.

A Fiduciary obligation in and of itself is a meaningless term. Fiduciary obligation to do what and for whom under what circumstances only makes the term meaningful.

THE COURT: Can you answer the question?

THE WITNESS: No, I can't.

Q Did you recognize during those months that the partners of Newburger, Loeb & Company had an obligation to deal in good faith with the rights of Mabel Bleich and Jeanne Donohue?

MR. SHAW: I object on the grounds this is not valid recross examination. We will go on forever.

THE COURT: Sustained.

Q Did you advise any of the partners of Newburger, Loeb & Company that they had an obligation to deal in good faith with Mabel Bleich and Jeanne Donohue?

A Yes.

Q When did you give them that advice?

A Whenever it was asked for which I don't really recall the exact times. You must understand, Mr. Mandel, that each one of these general partners had their own independent counsel --

THE COURT: You have answered the question.

Q You said whenever they asked.

Do you recall any specific occasion when you gave that advice?

A No.

Q Can you tell us to which partner you gave that advice?

A No.

Q Did you discuss that question of the need to observe good faith towards the limited partners with Mr. Persky at any time?

MR. SHAW: Objection.

THE COURT: Overruled.

A I don't believe so, no. I don't recall. I don't remember talking with Mr. Persky about that.

Q Did you discuss the question of the need to observe good faith towards the limited partners with anybody besides Mr. Persky associated with Finley, Kumble?

A Not that I recall, Mr. Mandel.

Q I think you said yesterday that it was your understanding that the Buckley account was a discretionary account; is that correct?

MR. SHAW: Objection, not proper subject of recross, your Honor.

MR. GRUTMAN: Absolutely, and I join in that.

THE COURT: On whose examination --

MR. GRUTMAN: Mr. Mandel's and nobody else. He will plow the air indefinitely unless you put limited on this.

THE COURT: I will sustain the objection.

Q Since yesterday have you found out in any way whether in fact the Buckley accounts were discretionary accounts?

MR. GRUTMAN: Objection, it is the same question.

THE COURT: I will allow it, one brief question. Did you find out that information since yesterday?

THE WITNESS: No.

THE COURT: Let's go on then.

MR. MANDEL: I would like your Honor's indulgence for one more question.

What was the source of your information that the Buckley account was discretionary?

MR. GRUTMAN: Objection. This is the third time he puts a question on which you rule.

THE COURT: I permitted him the second time. The first one I did not. I will allow this one last question.

A Could you repeat that?

THE COURT: What was the source of your information as to the Buckley account being discretionary?

THE WITNESS: As I recall it was the memoranda in the Newburger, Loeb compliance files and various correspondence with Golenbock & Barell and Miles.

Q That is the best you can say about that?

MR. GRUTMAN: That is another question, your Honor.

THE COURT: Sustained.

MR. MANDEL: Would you produce for me Kumble B.

Thank you very much.

Q Mr. Berkowitz, you have a copy in your hand of Finley, Kumble Exhibit B in evidence and you recognize it as a memorandum which you wrote to Paul Risher on December 7, 1970, do you not?

A That is correct.

Q Do you remember testifying to my friend, Mr. Esterman, this morning that in your opinion Newburger, Loeb was the wrong party to be sued for churning and there was no liability against Newburger, Loeb for churning because the churning had been done by a customers' man of Gross & Company?

MR. GLATZER: I object. That was not his testimony.

THE COURT: The jury's recollection will govern.

Do you remember testifying that way this morning?

THE WITNESS: I remember general testimony to that effect. I am not sure what the exact words were, your Honor.

Q I now ask you to read to the jury or read to yourself the paragraph beginning after 2; beginning with the words "He indicated" .

A Yes.

Q Have you read it to yourself?

A Yes.

Q Isn't it a fact that Persky told you and you told R[illegible]r that regardless of the legal opinion you advanced this morning Newburger, Loeb could be held liable because Leo Stern had written a letter to Buckley saying, "Your account is like any other of our accounts"?

MR. SHAW: Objection, your Honor.

THE COURT: What is the basis for the objection?

MR. SHAW: The objection is that alternately the witness is being asked questions with respect to his good faith and sometimes as an expert. I do not know whether it is clear.

If this is just related to good faith it seems to me this could confuse the jury because it is so remotely related to the issue of this case.

THE COURT: Overruled. You may answer it.

(Question read)

A There are two points in time here.

As this memorandum indicated the letter of Leo Stern was not discovered by me or by Mr. Persky until December 2nd. I was reviewing the Buckley accounts and it was the time before that when I answered Mr. Esterman's question so we are referring to two different points in time.

The Stern letter certainly would not change my opinion as to the settlement but make it stronger.

Q Did the Stern letter change your opinion as to the liability of Newburger, Loeb & Company on the churning account?

A Absolutely not.

MR. MANDEL: May I read this paragraph to the jury, your Honor?

THE COURT: You may.

MR. MANDEL: He indicated -- and that means Persky, right --

THE COURT: Give the date of the memo.

Q Memo of December 7, 1970 from Berkowitz to Risher, Finley, Kumble Exhibit B, reading the first full paragraph after the two and it starts with the words he indicated and that he indicated means Persky; does it not?

A That is correct.

Q "He indicated that he believed that this settlement was a reasonable one since Buckley may be able to hold Newburger, Loeb liable on the churning counterclaim due to a heretofore unknown letter of July 18, 1964 by Leo Stern addressed to Buckley which indicates that Buckley's accounts had the same standing as those of accounts opened by our own RRS."

A You asked me the question --

THE COURT: He is reading an exhibit to the jury, Mr. Berkowitz. There is no question before you. There is nothing for you to speak.

Q "In addition Mr. Persky pointed out that if we pursued our claim against Buckley he would probably declare bankruptcy and the banks to whom Buckley owes money would have claims prior to ours and therefore we would probably not be able to get anything from the bankruptcy."

Is that what you wrote in your memorandum?

A It speaks for itself.

THE COURT: It is in the memorandum.

Q Mr. Berkowitz, look at the last paragraph on the front page.

Does that refresh your recollection that you knew Jordon was the customers' man?

A Yes, on the date of this memorandum certainly.

Q And where did you get the information that Jordon was the customers' man? Did you get it from Persky?

A No.

Q Did you get it from the file?

A I believe I did get it from the files and -- I think I got it from my conversations with Seymour Goldstein. Seymour was the one who told me Jordon was the broker on this account.

Q Did you have a discussion with Persky about who was the broker on the account?

MR. GRUTMAN: There is no testimony Persky knew.

A I don't believe I had any conversations with Persky about who the broker on the account was certainly before the date of this memorandum. I don't know whether he received a copy of it or not. I know I didn't speak to him about it.

MR. SHAW: This is not proper recross.

THE COURT: Is this proper recross, Mr. Mandel?

MR. MANDEL: I believe it is, your Honor. Maybe we can do it this way:

I have other matters with Mr. Berkowitz. If Mr. Berkowitz is going to be available here throughout next week and the week after we can avoid questions or any questionable areas of what is right on recross.

MR. SHAW: Mr. Mandel has already conducted a complete examination on cross examination of Mr. Berkowitz.

THE COURT: He states that he has not.

MR. SHAW: He had an opportunity to. He went into the conspiracy, into the churning, into good faith, all the areas.

THE COURT: Mr. Shaw, you do not know and I do not know what his planned examination is and we cannot

(In open court - jury present)

THECOURT: Go ahead, Mr. Mandel.

CONTINUED RECROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Berkowitz, based on your investigation of the Buckley claim in November and December of 1970 or January or February of '71, did you ever advise the partnership of Newburger, Loeb & Company as its general counsel that in your considered opinion there was a valid churning claim owned by the Buckleys?

A Yes.

Q To whom did you give that advice?

A Robert Newburger, Andrew Newburger and Robert Stern.

Q When did you give them that advice?

A On or about the date of this memorandum.

Q Based upon the investigation you have told us about thus far, is that correct?

A That the claim appeared to have some validity.

MR. MANDEL: That is a different question.

MR. SHAW: We have gone through this before.

THE COURT: Overruled.

Q Did you say to them, "In my opinion, I have investigated this and it is a valid claim"?

A I told them that the claim appeared to have validity.

Q Did you tell them the degree of your investigation?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A I don't recall.

Q In reaching that opinion, did you rely upon information you got from Mr. Persky?

MR. SHAW: Objection.

THE COURT: Overruled.

A I don't believe so, no.

MR. MANDEL: No further questions.

RECROSS EXAMINATION

BY MR. GRUTMAN:

Q Did you have an employment contract with Newburger, Loeb & Company, Incorporated at the time that the transfer agreement was signed?

A No.

Q Did other people have such contracts?

A Yes, they did.

Q Do you know, Mr. Berkowitz, whether or not the agreement which Mr. Mandel referred to, the December 31, 1970 agreement, was actually signed by Miss Bleich?

MR. MANDEL: I object.

THE COURT: Sustained.

Q What is your opinion as to who is responsible for the churning cla

A I believe then and I believe now it is Gross & Company.

Q Gross & Company?

A Absolutely.

Q Charles Gross?

A As a partner of Gross & Company he is a responsible party, yes.

Q Mabel Bleich?

A As a general partner of Gross & Company, yes.

Q And Jeanne Donohue?

A For the same reasons, yes.

Q I believe you indicated that your opinion was based upon an investigation, a file, all sets of documents because there was a litigation underway, correct?

A That is correct.

Q And that was an opinion that you had sometime in late 1970, early 1971, correct?

A That is correct.

Q As of that point, was there a file, was there an investigation, was there any discovery in the amassing of documents with respect to the other claims referred to in the Ned Frank disclosure to you? That took a while, correct?

A Yes, it did.

MR. SHAW: No further questions.

RECROSS EXAMINATION

BY MR. MANDEL:

Q I will try to be brief but Mr. Shaw has opened up a few matters.

MR. GRUTMAN: Do we have to get that?

THE COURT: Mr. Shaw has opened up an area or I would not have let Mr. Mandel rise at all.

Go ahead.

Q Mr. Berkowitz, did you review the clearing agreement in November or December of 1970?

A Yes, I believe I did. I believe so, yes.

Q Where did you find it?

A I don't recall.

Q Whom did you talk to about it?

A In reference to finding the file or in reference to discussing the contents of the agreement itself, I am not sure.

Q The contents of the agreement, who did you talk to with respect to the contents of the agreement?

A I believe I did speak to Mr. Persky about it. I spoke to Leo Stern, Robert Stern, Dick Stern and as many Newburgers as I could find also.

Q Did you write memos to them?

A I don't believe so.

Q Did you suggest to them that they should start an action against Gross & Company for violation of the clearing agreement?

A I don't recall that. I just asked them about the clearing agreement.

Q You studied the clearing agreement, right?

A I testified that I did.

Q And you concluded that Gross & Company had violated the clearing agreement, right?

A I testified that under --

Q Don't tell me --

MR. SHAW: Objection.

THE COURT: May we have an answer, please. The question lends itself to a yes or no.

(Question read)

A No.

Q And that is why you never advised the partnership to sue Gross & Company, is that right?

A No. I don't know that they violated the clearing agreement. I said the liability was placed under the agreement on one party as to the other. I don't know that it was a violation of the agreement.

Q Mr. Berkowitz, did you understand in those days the difference between suing as an assignee of the Buckleys and suing in the separate right of Newburger, Loeb & Company?

MR. SHAW: This seems to be an entirely new issue, your Honor.

THE COURT: No, overruled. This was all opened up by a half dozen questions on your re-redirect, Mr. Shaw.

(Question read)

A The difference for what purpose?

THE COURT: Any purpose.

A No, I am afraid I really don't.

Q You didn't know then and you don't know now?

A I am not a litigater. I just don't know.

Q Are you familiar with contractual law, Mr. Berkowitz?

A Yes.

Q If Newburger, Loeb sued Gross & Company for a breach of the agreement it would have to prove damages, wouldn't it?

MR. SHAW: Objection.

THE COURT: Overruled.

A To prevail I assume so,yes.

Q They would have to prove not only that the Buckleys had been churned but that Newburger, Loeb had been hurt in some way by the churning, that is true, isn't it?

A I assume so, yes.

Q And to sue as an assignee of the Buckleys Newburger, Loeb or anybody else would only have the Buckleys' claim to stand or fall on; is that correct? Do you understand that?

A That is correct.

Q Do you further understand that if Newburger, Loeb itself were liable to the Buckleys because of the churning, because of Leo Stern's letter or under the law Newburger, Loeb might be a joint tort feasor in this action?

MR. SHAW: Objection.

THE COURT: Overruled. You asked him what his opinion was on this situation, what his views about his validity were, what he said to people about his validity. This is exploration into that subject.

Overruled.

MR. SHAW: May I make one statement very briefly. How relevant is it that the facts or theories of a lawsuit slowly unfold and are not immediately grasped by the general counsel of the corporation?

THE COURT: That is not what we are concerned with. We are concerned with certain subject matters of the ways on re-redirect which now must be explored further. I may be concerned with what you are saying but that relates to another situation.

(Question read)

THE COURT: Is that your understanding?

A Yes, the question makes good sense, yes.

Q Don't you know that it is a joint tort feasor who may not take an assignment of a claim?

MR. GRUTMAN: Objection.

THE COURT: Sustained.

Q Did you know then?

MR. GRUTMAN: Objection.

THE COURT: Sustained.

Q Did you advise the partnership to sue Gross & Company based on the assignment which it took from the Buckleys?

MR. SHAW: Has not that been brought out over and over again?

THE COURT: Did you or did you not?

A No.

MR. MANDEL: No further questions.

MR. SHAW: No further questions.

MR. GRUTMAN: Thank you, Mr. Berkowitz.

(Witness excused)

MR. SHAW: The plaintiff calls Robert Persky to the stand, your Honor.

ROBERT S. PERSKY, called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Persky, how are you employed at the present time?

A I am a partner in the firm of Persky & Jarblum, a law firm in New York City.

Q How long have you been so employed?

A Since the firm commenced its operations in October of 1973.

Q Prior to October of 1973, how were you employed?

A From 1963 to the beginning of '73 I was a partner in a firm known then as Finley, Kumble, Underberg, Persky & Roth and its predecessors, some of which had different names.

Q Were you the Persky in that name?

A Yes, sir.

Q Prior to 1965 how were you employed?

A I was a partner in a firm known as Harold, Luca, Persky & Moser from 1957 to 1965.

Q Prior to 1957, what were you doing?

A I had spent the immediate prior year as an assistant counsel to the Waterfront Commission of New York Harbor and for the two prior years as law secretary to Judge Clarence Galstein in the Eastern District, Federal Court, New York.

Prior to that I had spent two years in the United States Army and before that I was in law school.

Q What law school did you attend?

A I went to Harvard Law School.

Q What college did you attend?

A New York University.

Q How old are you?

A Forty-five.

Q Mr. Persky, in addition to being admitted to the Bar of the State of New York, are you admitted to the Bar of any other jurisdiction?

A Yes, I am admitted to the Federal Courts in the Eastern and Southern Districts of New York, the United

States Court of Appeals for the Second Circuit and the Supreme Court of the United States and the Military Court of Appeals.

Q Mr. Persky, did there come a time when you were convicted of a crime?

A Yes, sir.

Q When was that?

A I was indicted in March of 1973 and there were two trials arising out of that indictment, one of which ended in June of '73 and the other one ended in January of '75.

Q Would you tell the Court and jury what statute you were convicted of having violated?

A I was convicted of violating two separate sections of the Securities and Exchange Act of 1934.

Q What were those sections?

A One was Section 15 and the rule which was issued pursuant to that section relating to the filing of an annual report for a public company and the specific charges that the report was false in that it omitted to state that some funds had been stolen by someone else, and the second charge related to Section 10 and Rule 10(b)(5) and specifically it was that a press release which I approved and a letter under my signature as secretary to the company -- a letter under my signature as secretary to the company were sent to shareholders which omitted to state the same facts as the annual report.

Q In what year or years were those omissions to stated facts made by you?

A The two counts related to the summer of '70, July '70 and November of 1970.

Q What was the name of the corporation involved in the annual report and in the press release?

A Microthermal Applications, Inc.

Q Do any of the principals, to your knowledge of Microthermal, are any of the persons involved in any way in the facts of this case?

A No.

Q Was the trial a trial before a jury?

A Yes.

Q Do you accept the verdict of the jury?

A I accept the verdict of the jury.

MR. SHAW: May I approach the bench?

THE COURT: Yes.

(At the side bar)

MR. SHAW: Your Honor, I have to the extent of my ability brought out what I consider to be all of the salient facts relevant to inquiry with respect to Mr. Persky's criminal record. I feel that I have made a full disclosure and I would entertain any suggestions from either counsel for the other parties in this case or from the Court with respect to any other material fact which I should reveal.

THE COURT: I do not think this is an appropriate time for this.

MR. SHAW: I want a ruling in advance that I have made such a comment. I would object to any further inquiry.

THE COURT: I decline to do that, Mr. Shaw. If I had known this was the subject of the bench conference I would not have held it.

(In open court)

Q Mr. Persky, notwithstanding the conviction that you have referred to, are you at the present time an attorney in good standing with the Bar of the State of New York?

A Yes, sir.

Q Did there come a time when you became the attorney for Newburger, Loeb & Company?

A Yes.

Q When was that?

A The firm of Finley, Kumble of which I was a partner was consulted in the latter part of August '70 and from that time on I became involved in some of the legal affairs of Newburger, Loeb & Company.

Q Can you recall the initial legal matters or legal affair that you handled for Newburger, Loeb & Company?

A I sat in on but was not primarily responsible for the discussions relating to the problem with the least at One New York Plaza. We progressed into other matters, some of which I became primarily responsible for, one was to negotiate a clearing agreement with W.E. Hutton & Company.

Q At that point was there another law firm representing Newburger Loeb & Company?

A There were to my knowledge two other law firms representing.

Q Who were they?

A The law offices of Osmond & Frankel and there was the law firm of Golenbock & Barell.

Q Can you tell the Court and jury what legal work you were performing for Newburger, Loeb & Company during October and November of 1970?

A Personally as opposed to the firm I was responsible for the clearing agreement with W.E. Hutton and with an exploration of what solutions were available to avoid the liquidation of the partnership by the New York Stock

Exchange. That included but not limited to the transfer of the assets to a corporation. And the infusion of new capital.

Q At that point, can you tell the Court and jury what the firm of Finley, Kumble, Underberg, Persky & Roth was doing, October and November of''70, insofar as Newburger, Loeb & Company was concerned?

A The Real Estate Department was trying to negotiate a settlement of the lease at One New York Plaza. That is they wanted to relieve the partnership of I think a $6 million liability over a period of years by a payment of a flat sum.

The negotiations with W.E. Hutton were going on in connection with the clearing agreement and we began to meet with representatives of the general partners who by that time had retained their own counsel and the limited partners who had retained counsel and the subordinated lenders for several purposes.

One was to inform them of the seriousness of the financial condition of Newburger, Loeb & Co. and, secondly, was to explore what if anything could be done to infuse capital first from the existing structure of the partnership, the general partners, the limiteds and the subordinated lenders and, thirdly, to explore whether or not sources of capital could be obtained from individuals or institutions not already connected with the partnership.

In addition to that, we were given a number of litigation files that Golenbock & Barell had been working on. I don't believe we got anything from Osmond Frankel's office and we did not get the problem of disposing of the Buffalo Braves franchise. That was left with Golenbock & Barell.

Q What does the phrase "general counsel" mean?

A To me it means that we have the primary responsibility for the legal affairs of the partnership as a partnership.

Q Did there come a time when Finley, Kumble became general counsel to the partnership?

A Not by a formal act but by the fact that we were being consulted by the principals of the partnership more often than any other attorney or firm in connection with their legal affairs.

Q At this point, the fall of 1970, how many attorneys were there in Finley, Kumble, approximately?

A I think approximately thirty.

Q Was the firm broken up into various areas of expertise?

A It was broken up into departments.

Q How many departments were there?

A There was the litigation department, the corporate department, the real estate department and a catchall trust, estate and banking department.

Q Would you tell the Court and the jury the various names of the persons in Finley, Kumble who were handling various aspects of the business and legal problems of Newburger, Loeb during the fall of 1970 and indicate in what department of the firm they were?

A Mr. Underberg was the partner in the real estate department who had the primary responsibility for handling the real estate problems of the partnership.

Mr. Roth was in the litigation department and he was the partner primarily in charge of litigated matters.

I was the partner in the corporate department who had the primary problem of corporate matters.

Q Did any other person employed by Finley, Kumble work on the Newburger, Loeb account during this period of time?

A Yes, each partner had other partners and other associates working with him in connection with these matters.

Q Can you recall these persons' names who worked on Newburger, Loeb matters during this period?

A I don't know with whom Mr. Underberg was working at the moment.

Mr. Bamberger and Mr. Rosenblume were assisting me.

I think Mr. Gelb was working with Mr. Roth.

Q Does the name Snider mean anything to you?

A Yes, Donald Snider was in the litigation department and he was brought in actually in my request in connection with the churning claim.

Q Are you familiar with Newburger, Loeb Company, Inc.?

A Yes, sir.

Q What if any legal work did you do in relation to that entity?

A By the end of December of 1970 there seemed a reasonable possibility that we would be able to reorganize the partnership so as to avoid liquidation and what we believed to be the inevitable individual bankruptcy of the partners and we formed, I think on the date of the closing agreement, the December 30th agreement, a Delaware corporation which was to eventually acquire the assets of the partnership.

Q Is that Delaware corporation Newburger, Loeb & Company, Inc.?

A Yes, sir.

Q Can you recall attending any meetings of the limited and general partners of Newburger, Loeb during this period of time?

A Yes.

Q When can you recall was there the first such meeting that you attended?

A I can't tell you the exact date, sometime in September or October, I believe the meetings of the general partners and limited partners and subordinated lenders began.

Q Can you recall where the first meeting was held?

A I believe the first meeting was at the offices of Finley, Kumble.

Q Can you tell us who was present at that first meeting?

A I think that all the Newburgers and Sterns were there. I don't remember which of the other general partners were there. Some of thelimited partners, I don't remember which ones, some of the subordinated lenders, I think Bob Muh and Paul Risher were there and I think at the first meeting Fred Kayne was there.

Q Can you tell the Court and jury what occurred at this first meeting?

A A presentation was made to all of the people assembled as to the financial condition of the partnership. I recollect a rather long, meaning wide, sheet handwritten which was prepared by Peat, Marwick & Mitchell set forth as of some date reasonable proximate to that meeting the financial position of the firm and the capital accounts of all the partners.

Q Can you recall in substance what was said?

A Well, there was an explanation given of the precarious financial position of the firm. There was an explanation given of where the firm stood in relationship to continued existence as far as the New York Stock Exchange was concerned and there was a general question and answer period because some of the general partners, and I think all of the limited partners and the subordinated lenders were in attendance and were in a state of shock because they had not known how precarious the financial condition was.

MR. MANDEL: Objection to that.

THE COURT: Strike that.

Q As of the point of that meeting, can you recall whether Charles Gross was or was not a general partner of Newburger, Loeb & Company?

A I think that he had withdrawn as a general partner prior to that meeting.

Q As of that point, can you recall if Mabel Bleich and Jeanne Donohue were or were not limited partners of Newburger, Loeb & Co.?

A I believe they were limited partners and I believe that someone from Golenbock & Barell attended on their behalf.

Q They did not personally attend?

A I am certain that Mrs. Donohue didn't and I don't think Mrs. Bleich did.

Q Can you recall the name of the person from Golenbock & Barell who you say was present in their behalf?

A I am not certain whether Mr. Silverman was at the first meeting but it was probably Mr. Silverman.

Q Are you referring to Arthur Silverman?

A Arthur Silverman.

Q Can you recall if anything was done as a result of this first meeting? That is were any steps taken by you or Finley, Kumble?

A No, the purpose of that meeting was an information meeting.

Q Can you recall if any committees or groups were formed?

A As a result of that meeting the individual partners and the limited partners and subordinated lenders all seemed at that point to consult outside counsel.

Q Did there come a time thereafter when there was a further meeting of the general partners, limited partners, et cetera, and their outside counsel?

A There were many such meetings.

Q Can you recall a meeting occurring in December of 1970?

A There were several meetings in December. The one that stands out in my mind was the one that resulted in the December 30th transfer agreement.

Q Can you recall approximately when that meeting took place, when in December?

MR. MANDEL: I am going to object, your Honor, and I am sure it is inadvertent, but the testimony is that no agreement was executed on December 30th. Some papers were executed but not the transfer agreement.

MR. SHAW: Isn't that something Mr. Mandel can bring out on cross examination? If I ask a question improperly he can correc[illegible]y false impression I create.

MR. MANDEL: It is not an issue here. It is an inadvertence but if Mr. Shaw does not agree with me I will withdraw my objection.

THE COURT: Objection is withdrawn.

Q I was asking you if you can recall when there was this meeting in December the result of which certain documents were signed?

A My recollection is that it started sometime in the late morning or afternoon and went through the evening into the early morning hours.

Q As of this point, have you had any conversations with Mr. Berkowitz with respect to the Buckleys?

A Yes.

Q When for the first time was that name or names mentioned?

A Sometime I believe in November the litigation department gave me the Buckley file to review.

Q Are you referring to the litigation department of Finley, Kumble?

A Yes, sir.

Q Specifically who are you referring to there?

A Mr. Roth.

Q After Mr. Roth gave you this file, what did you do?

A I read the file and I think that the reason he had given it to me, it seemed eminent that the arbitration would commence.

Q Was this a voluminous file?

A This may not be very articulate but it was about four inches thick.

Q After you had received the file, what if anything did you do?

A I believe the first thing I did was call up Webster, Sheffield and I believe I spoke to Mr. Ryan whose name I had found somewhere in the file as being the partner there in charge and asked whether I could come over and discuss a possible settlement of the claim.

Q When was this, sir?

A It was probably in late November of 1970.

Q As of this point had you had any meetings or communications or conversations with Mr. Silverman in relation to Mrs. Bleich and Miss Donohue?

A I am not certain as to when I had conversations or communications with him but there was a time when he informed me that his firm had decided and Mr. Gross had decided that there was a conflict of interest between Mrs. Bleich, Mrs. Donohue and Mr. Gross and that Mr. Gross would be represented by another attorney and that they would continue to represent Mrs. Bleich and Mrs. Donohue and that his instinct at that time was to recommend that they go along with the transfer agreement.

Q When were you so advised by Mr. Silverman that his instinct was that they should go along with the transfer agreement?

A I believe he did that in writing and I don't remember the date of the letter.

Q Was that before or after you spoke with Mr. Ryan for the first time?

A I don't know.

Q Did there come a time when you were advised differently by Mr. Silverman?

A Yes, subsequent to his first letter there came a time when he told me that his clients were not going to go along regardless of his advice.

Q When in relation to February 11, 1971 was that, to the best of your recollection?

A I think it was subsequent to December 30th and prior to February 11th.

Q Can you recall the substance of your conversation with Mr. Ryan after you received the Buckley file?

A I went over to the offices of Webster, Sheffield and I met with Mr. Ryan and a younger man, I think his name was Mr. Cook, and we discussed the claim against Mr. Buckley and I guess we discussed three areas of that.

The first area was Mr. Buckley's financial condition and Mr. Ryan's position was let's forget the merits of the claim for the moment. If you win it you are not going to collect the money because Mr. Buckley does not have it but I can get some money from his father and you better consider that as the best financial settlement you will ever get out of Mr. Buckley.

Then we discussed the counterclaim which Webster, Sheffield had submitted against Newburger, Loeb and we discussed the legal theory of that and I told Mr. Ryan that I didn't understand how he could possibly hold the clearing broker liable because all the clearing broker was doing was ministerial work, keeping records and it was Gross who was selling the stock and earning the commissions.

At that point Mr. Ryan said well, I will tell you what I am going to base my argument on and he gave me the copy of the Leo Stern letter which could be read and interpreted two ways.

MR. MANDEL: I object to that.

THE COURT: Sustained.

Q Just tell us what was said by you and by him at this meeting.

A He gave me the copy of the letter which I had not previously seen and said that they would base their responsibility claim against Newburger, Loeb on that letter.

The third topic basically was how can we resolve this matter. I think at that point they made an offer of $50,000 payable in two installments and I advised them that if there was to be a settlement the money would have to be paid relatively promptly and I think we discussed mechanism. I think there was some stock at Merrill, Lynch and there was some proceeds in the Buckley account at Newburger, Loeb.

Then we adjourned and I went back for the further instructions from Newburger, Loeb.

Q Who did you confer with?

A I didn't confer. I picked up the phone, I called Larry Berkowitz and I described to him the substance of my conversation with Mr. Ryan and I told him about the Leo Stern letter.

Larry discussed with me what other infirmaties there might be in the claim and I asked him to get authority to settle the claim for $50,000.

During that conversation I believe it was Larry raised the issue of whether or not we were going to get an assignment of the claim against Gross and I said I had not raised that issue with Mr. Ryan but I would go back and inquire.

Q Did you do that, sir?

A I did. I called Mr. Ryan. I told him that the question was raised as to whether or not we could obtain an assignment of that claim as part of a settlement and an agreement to cooperate from Mr. Buckley.

I don't know whether it was during that phone conversation or in a subsequent phone conversation he agreed that that could be part of the settlement.

Q Do you recall approximately when it was that you picked up the Buckley file for the first time?

A I would think it was not earlier than November.

Q Do you recall the approximate date?

A No.

Q I show you this document, Plaintiffs' Exhibit [illegible]1 and ask you if it refreshes your recollection more precisely as to when for the first time you saw those Buckley papers?

A Yes, it refreshes my recollection to the extent it must have been within the week of November 11, 1970.

Q Can you recall as of what date it had been agreed to settle the Buckley claim?

A The oral agreement?

Q The oral agreement.

A Sometime the first two weeks of December.

Q Can you recall the precise date?

A No.

Q I show you Plaintiffs' Exhibit 36 in evidence and ask you if it refreshes your recollection?

A Yes.

Q When was the Buckley claim settled?

A The oral agreement to settle would be within a few days before December 16th and I forwarded the proposed settlement documents to Mr. Cook at Webster, Sheffield on December 16th.

Q Do you recall the precise date when you were advised for the first time that Jeanne Donohue and Mabel Bleich would not in fact sign the transfer agreement as a limited partner?

A The precise date, no.

Q I show you this piece of paper and ask you if it refreshes your recollection?

A Yes, it does.

Q When were you advised in behalf of Mrs. Bleich and Miss Donohue for the first time that they would not in fact sign the transfer agreement?

A To the extent this letter of December 31st from Golenbock & Barell says they do not have advice authority to sign, I was advised they don't have authority on December 31st, I think Mrs. Bleich did sign on December 31st. I was advised sometime later that she changed her mind.

Q When did you first learn that there would be a problem, let's put it that way, if any, with respect to their signing or continuing to authorize the transfer agreement?

A On December 31st and subsequent thereto the problem hardened. You have to understand there was a problem with everyone signing. Each one was negotiating on behalf of himself so that I was never certain until they actually signed that any particular individual, whether it was Gross, Donohue, Bleich or Robert Newburger, would sign.

MR. SHAW: I offer this document in evidence.

MR. GRUTMAN: No objection.

MR. MANDEL: No objection.

THE COURT: Received.

(Plaintiffs' Exhibit 51 received in evidence)

MR. SHAW: May I read this letter?

THE COURT: Yes.

(At this point Plaintiffs' Exhibit 51 in evidence was read to the jury by Mr. Shaw)

Q Mr. Persky, prior to December 31, 1970 had you had any conversations with Charles Gross?

A I don't remember whether I had a conversation with him or after the 30th but there was a time when I met with Mr. Mandel and Mr. Gross and Mr. Risher at Mr. Mandel's office.

Q Can you recall if that was before or after December 16, 1970?

A I don't remember.

Q Will you tell the Court and the jury what was said at this meeting between yourself, Mr. Gross and various other persons?

A The purpose of the meeting was to attempt to resolve what I guess in today's language would be called stonewalling by Mr. Gross in connection with the proposed transaction.

MR. MANDEL: Objection.

THE COURT: Strike that.

A We were trying to describe to Mr. Mandel --

THE COURT: Mr. Persky, just set up the meeting, who was there, and tell us what those people said.

A Mr. Gross was there, Mr. Mandel was there, Mr. Risher was there and I was there.

THE COURT: And in substance what was said?

THE WITNESS: We discussed what would be the financial result to the general partners and the limited partners and subordinated lenders if there was no transfer and the New York Stock Exchange closed down Newburger, Loeb.

I told Mr. Mandel that it was the opinion of all of the counsel who were involved in this proposed transaction that there would be bankruptcy of the partnership and each of the individual partners and that included the withdrawn partners, specifically Mr. Gross, because they were liable for the debts of the partnership that arose while they were partners, including the leases that were signed while they were partners.

I told Mr. Mandel that there was a great deal of hostility on behalf of the general partners and the limited partners and the subordinated lenders to Mr. Gross because they blamed him for many of the acts which brought the partnership to the present state of affairs.

I told him that I thought it was in the best interests of his client to go along with the transaction. Mr. Mandel and I understood that it was not required that Mr. Gross sign the agreement for the transfer to take place. It was only necessary for him to sign if he would accept the type of treatment that other general partners were getting who had what they call good capital at that point on the books of the corporation.

We also believed --

MR. MANDEL: I am going to move to strike what Mr. Mandel understood.

MR. SHAW: Consented to, your Honor.

Q Just tell us what was said.

A We also discussed whether or not -- I told Mr. Mandel that I believed that Mr. Gross would be the most influential person in giving advice to Mabel Bleich and Jeanne Donohue and I told him that I thought it was also in their best interests and that all the other attorneys who were analyzing the financial condition of the company and several accountants had decided that it was in the best interests of their clients and limited partners to go ahead because if there was a dissolution there would be no recovery by any limited partner.

I also told Mr. Mandel that there were many claims by individual general partners and individual limited partners and subordinated lenders against Mr. Gross and that if there was not a resolution of the problem that it would not be a simple matter for Mr. Gross to say I am owed some money and I am going to get it without any difficulty.

Mr. Mandel told me that his client would only consider a resolution of the problem which gave him immediate cash which was a right which he was not even entitled to under the partnership agreement.

MR. MANDEL: I object to that unless he says that I said that.

THE WITNESS: I am saying that you said that.

THE COURT: Mr. Mandel said all of that to you?

THE WITNESS: "Which was not a right" is my language, the last part.

THE COURT: Did Mr. Mandel say that to you in substance?

THE WITNESS: Only the first part. The second part is what I am saying.

THE COURT: We will strike that part.

Q Did you and Mr. Mandel have any discussions with respect to the partnership agreement?

A Yes. I Mr. Mandel that his client was demanding more than he was entitled to under the partnership agreement.

Q What did Mr. Mandel say in response to that?

A That that was what his client wanted.

Q Did he say anything further?

A The discussion went on for perhaps forty-five minutes. I don't remember any other specifics of it.

Q Other than saying this is what his client wanted did Mr. Mandel give you any further reason as to why his client should be paid cash at that point?

A Mr. Mandel said his client would rather see the firm liquidated and take his chances on bankruptcy than see it go forward if he didn't get cash.

Q As a result of this meeting, did you and Mr. Mandel and Newburger, Loeb and Gross & Company and Charles Gross and Jeanne Donohue and Mabel Bleich reach an agreement?

A No, the only agreement we reached at that meeting is that I would keep Mr. Mandel informed of what was transpiring by giving him copies of all the documents.

Q Did you do that, sir?

A I did, sir.

Q Did you thereafter have any further meeting or meetings with Mr. Mandel or Mr. Gross?

A There was a subsequent meeting with Mr. Mandel.

Q When was that approximately?

A Sometime between the December 30th agreement and February 11th there was a meeting at the offices of Golenbock & Barell.

MR. MANDELL: I am objecting again to the word "agreement". I don't think he means that is what it was and it is a conclusion.

The last time Mr. Shaw changed it to document.

Q Were you referring to this document when you said agreement?

THE COURT: Is that December?

MR. SHAW: Dated as of December 31st.

MR. GRUTMAN: I have clarified it.

Q When you refer to the December 31st agreement, are you referring to a preliminary form of that agreement or a draft?

A I am referring to the document that was signed at the Finley, Kumble office on December 31st.

Q And the document before you, 24, when was that signed?

A This I believe was the February 11th version.

Q In this second meeting with Mr. Mandel which took place at the offices of Golenbock & Barell, can you tell us who was present besides yourself and Mr. Mandel?

A I think Mr. Silverman was present and a number of other attorneys representing general partners and limited partners and subordinated lenders. I think there was someone representing the Stroock, Stroock & Lavan office. I don't remember whether Mr. Steefel himself was at that meeting. There was somebody representing the Richenthal office but I am not certain it was Mr. Richenthal himself. I think Mr. Levy was present.

Q Can you tell us what was said, what was done at this meeting?

A The purpose of the meeting was an attempt to resolve the differences between Mr. Gross, Mrs. Donohue, Mrs. Bleich, the limited partners, the general partners, the subordinated lenders and to a certain extent the new corporation. Various proposals were set forth by each side in an attempt to put to rest the disputes and propositions were made and modified as to what Mr. Gross and Mrs. Donohue and Mrs. Bleich would accept in way of securities of the new corporation and what the general partners, limited partners, and the subordinated lenders would give up in terms of their claims against Mr. Gross.

We also had a discussion of the claim of the Buckleys which had then been assigned against Mr. Gross.

Q What was said?

A In relation to the Buckley claim?

Q No, just tell us what was said with respect to the various claims that you had mentioned.

A Each of the attorneys representing general partners and limited partners and subordinated lenders expressed the fact that they believed their clients had claims against Mr. Gross.

Mr. Mandel expressed his view that these claims were without merit. I told Mr. Mandel that I thought that the Buckley claim had merit and we had a draft complaint reduced to writing and I think I gave him a copy of it and circulated it around the room.

It was a long meeting and as the meeting progressed there eventually evolved a formula which was agreeable to each of the people, each of whom had varying reasons for objecting or agreeing to certain things.

Mr Mandel got up and said he was ready to recommend that package to his client.

Q Namely?

A Mr. Gross.

Q What was that package?

A It was a combination of cash and some securities of the corporation and I believe that it would include releases running from the partners, the limited partners and the subordinated lenders and the corporation to Mr. Gross.

Q Then what happened?

A Mr. Mandel left the room and said he would call his client and discuss the settlement with him and urge it upon him.

Q Urge upon him to do what?

A Accept the settlement.

Q What happened next?

A Mr. Mandel was gone forty, forty-five minutes.

Q Did he then return to the room?

A He returned to the room.

Q Who was present in the room when he returned?

A I believe almost everyone who was in the room when he left. Maybe some people had gone out but my recollection is that basically it was the same assembled group.

Q What did Mr. Mandel say when he came back?

A He informed the group that his client was unwilling to accept the settlement and wanted an all cash proposal.

Q As a result of this meeting, was an agreement reached between Newburger, Loeb & Company and Newburger, Loeb Corporation, Inc. and Charles Gross, Mabel Bleich and Jeanne Donohue?

A No.

Q As a result of this meeting was an agreement reached between Newburger, Loeb & Company, Newburger, Loeb Corporation, Inc. and all of the partners and limited partners and subordinated lenders with the exception of Mr.

Gross, Mrs. Bleich and Miss Donohue?

MR. MANDEL: That is leading.

MR. SHAW: Withdrawn.

Q What occurred as a result of the meeting?

A That meeting really had no result.

Q Subsequently was there another meeting?

A There were a series of other meetings between that time and February 11th.

Q What occurred on February 11th?

A On February 11th a revised version of the December 31st document was executed by the then general partners, the limited partners and the subordinated lenders and the corporation.

Q Is that Exhibit 24?

A Yes.

Q Was that an agreement agreed to by Charles Gross?

A No.

Q Was Charles Gross a general partner of Newburger, Loeb on or about February 11, 1971?

A No.

Q Was that agreement agreed to by Jeanne Donohue or Mabel Bleich?

A No.

Q Were Jeanne Donohue and Mabel Bleich, in your opinion, limited partners of Newburger, Loeb & Co. as of February 11, 1971?

A They were limited partners who had given withdrawal notices.

Q When had they given withdrawal notices? That is approximately.

A Prior to February 11th. I don't remember the date.

Q Prior to February 11, 1971 had you met a man by the name of Paul Burak?

A Yes.

Q What firm was he with?

A Rosenman Colin --

MR. GRUTMAN: Colin Kaye, Petschek, Freund and Emil.

A I adopt that answer.

Q Had you met Mr. Freund?

A Yes.

Q In what connection had you met either of these two gentlemen?

A It's my recollection that in September or October I went with one or both of the Newburgers and the Sterns, Mr. Risher, Mr. Muh, to meet with Mr. Freund and discuss what could be done to save the partnership.

We had a discussion as to what steps could be taken to effectuate a saving of the partnership.

Q Were these gentlemen thereafter present at the various meetings?

A Someone from the Rosenman firm was present at almost all of the meetings. It was either Mr. Freund, I think a Mr. Ambrose who was one of his partners and then at the end Mr. Burak.

Q In what capacity were they present?

A Their capacity changed. In the beginning they were representing, I believe, the Newburgers and the Sterns and some of the wives who were also either limited partners or subordinated lenders. Then some of the Newburgers and some of the Sterns retained other counsel.

Then after December 31st, after the execution of the document on December 31st the Rosenman firm was retained by the partnership to do the work required under the agreement for the partnership in connection with the proposed February 11th closing.

Q Are you familiar with Section 98 of the New York Partnership Law?

A I am.

Q When did you first become familiar with that section?

A Sometime between December 31st and February 11th.

Q December 31, 1970?

A Yes, sir.

Q Had there been any conversations regarding the section between you and any members of the Rosenman firm?

A None with me directly.

Q Had you had conversations with any persons regarding this section?

A Yes.

Q With who?

A Mike Bamberger, who was at Finley, Kumble told me that in his conversations with Burak that Burak had raised --

Q All right. That is hearsay.

MR. MANDEL: I have no objection.

Q What did Mr. Bamberger tell you?

A He told me Mr. Burak had raised the question as to whether or not the assets could be transferred without the signature of all the limited partners and I asked Mr. Bamberger to either research the problem himself or to have someone at the firm do it so we can have an intelligent discussion with Mr. Burak.

Q As of that point had notices been given by Mrs.

Bleich and Miss Donohue?

A I think they had already given the notices but I am not positive.

Q I am referring to notices of withdrawal.

A Right.

Q Did you have any further conversation with Mr. Bamberger with respect to Mr. Burak prior to February 11th of 1971?

A A day or two later Mr. Bamberger came back with a xerox copy of a case for me to read.

Q Did you read that case?

A Yes.

Q Thereafter, did you have any further conversations with Mr. Bamberger with respect to Section 98 or the Rosenman firm?

A Yes.

Q When was that?

A The night of February 11th.

Q Did there come a time on February 11th when there was a meeting between the various general partners and limited partners and subordinated lenders and various attorneys and all the people involved in this matter?

A Yes.

Q When did that meeting begin?

A Sometime in the late morning or early afternoon of the 11th.

Q As of that point had Newburger, Loeb received any notices or notice from the New York Stock Exchange?

A We had received a number of notices from the New York Stock Exchange.

Q What was the status of the last notice received as of February 11, 1971?

A The last notice said that if there was not an infusion of new capital and a firm agreement that they would put us in liquidation the following morning.

Q February 12, 1971?

A Correct.

Q In addition to being present at these various meetings, attending the meetings that you have told us about, reviewing the Buckley file, researching, speaking with your partners and associates, prior to February 11, 1971, had you done or attempted to do anything else?

MR. MANDEL: I object to the form of the question.

THE COURT: Sustained.

MR. SHAW: I withdraw it.

Q Prior to February 11, 1971 had you done anything else?

A In connection with --

Q In connection with Newburger, Loeb.

A Yes.

Q What?

A I had a discussion with someone who was not then a client of the firm but who is known to me about the need for the partnership or the corporation of additional capital.

Q What was that person's name?

A Mr. Alex Aixala.

Q When did you first have a conversation with Mr. Aixala?

A Sometime during the fall of 1970.

Q And Mr. Aixala is a defendant in this case, is he not?

A Yes, sir.

Q Can you tell the Court and the jury what you told Mr. Aixala during the first meeting that you had with him about Newburger, Loeb?

A I told Mr. Aixala about the financial condition of Newburger, Loeb, the fact that they were looking for new capital, that it was contemplated by the then general partners on one hand and then quite separately by some people who were not then general partners to form a corporation to acquire the assets in the busienss but that was predicated on the infusion of new capital both because the New York Stock Exchange required it and the old subordinated lenders and the limited partners wouldnot go along in keeping their money at risk unless there were additional working capital put into the new entity.

I told him that I thought that in a risky business it was a relatively save investment because there would be no exposure to such things as claims of people who had bought stock in prior underwritings because the new entity would not acquire those liabilities and that we would be able to put in a trigger clause in his agreement which would enable him to ask the corporation to dissolve if the losses mounted up to a certain figure.

I don't remember the exact amount now but it is in his subordinated stock agreement.

Q As a result of these conversations, what did Mr. Aixala tell you he would do?

A Mr. Aixala said that he would be willing to subordinate Bacardi Corporation stock which then had a market value of about $1 million to the new corporation.

Q And did he do that?

A Eventually he did.

Q Prior to February 11, 1971 had you had any meetings with any representatives of the New York Stock

Exchange?

A Yes, sir.

Q About how many meetings were there?

A I believe I was present at three or four different meetings.

Q With whom did you meet?

A At various times we met with various people but the names I remember are Robert Bishop, William Dilger, I think William Belcher, I am not sure of the first name, and there were other people whose names I don't remember at the moment.

Q Can you recall who you met on the first occasion, with whom you met?

A No.

Q Can you recall the substance of the conversation on the first occasion of your meeting with the New York Stock Exchange?

A The first occasion I believe was devoted to discussion that we must immediately have a clearing agreement with some other firm so that the capital requirements of Newburger, Loeb would be lessened. That was a precondition to then listening to any other plan of reorganization and we then discussed what possible reorganizations could take place.

MR. MANDEL: Can we have a date for this?

Q When was that?

A October or November '70.

Q As a result of that meeting was an agreement made with W.E. Hutton?

A It was not a result of it. We went to work promptly to continue discussions which had previously commenced and there was reasonably proper thereafter a clearing agreement.

Q Did you negotiate that agreement?

A Mike Bamberger did most of the work on the clearing agreement.

Q Will you explain to the Court and jury what effect that agreement had on the capital or the financial affairs of Newburger, Loeb & Co.?

A The New York Stock Exchange requires brokerage firms to have a ratio of indebtedness to capital which is not exceeded by certain limits.

In those days I think that there was a straight twenty to one but it is subsequently changed. When they say aggregate indebtedness, you put all of your debts on one side, everything you owe to people, including stock that has not been delivered, money in customers' accounts and so on.

On the other side to make this fraction, this ratio, you put your liquid assets so you exclude furniture and fixtures and you exclude even the New York Stock Exchange seat. You only put in cash and cash equivalents like securities or notes and you exclude money owed by partners to the firm. If a partner owed $250,000 and it was unsecured, they didn't have some security securing it, that didn't count.

When you are clearing for yourself you have this huge indebtedness because you have all the customers' securities, you have money owed to other firms for securities they haven't delivered.

When you execute a clearing agreement all of that debt is transferred over to the clearing house, in this case W.E. Hutton.

Therefore, the capital remains constant but the indebtedness is reduced so that the fraction is smaller and therefore your capital position is improved.

THE COURT: Mr. Shaw, when you get to a point where we can stop, we are at two minutes past one.

MR. SHAW: This would be an appropriate time to stop.

THE COURT: All right.

Ladies and gentlemen, 10:30 Monday morning, Newburger, Loeb

v

71 Civ. 685

Charles Gross, et al.

New York, New York
June 30, 1975
10:30 a.m.

- - -

(Proceedings resumed.)

- - -

(In open court; jury present.)

ROBERT PERSKY, resumed.

THE COURT: Good morning.

DIRECT EXAMINATION (Continued)

BY MR. SHAW:

Q Mr. Persky, I believe that when we rested on Friday you were telling the Court and jury about various meetings that you had with representatives of the New York Stock Exchange during the fall of 1970, and you told us about one being with respect to certain matters that related to the subsequent execution of a clearing agreement with W.E. Hutton. Do you recall that testimony?

A Yes, sir.

Q In addition to those meetings you have told us about, with the New York Stock Exchange, as they related to the W.E. Hutton clearing agreement, did you attend other meetings with representatives of the New York Stock Exchange during the fall of 1970?

A Yes.

Q When were these meetings?

A I cannot pinpoint the dates, but they span the time from November to February 11th of 1971.

Q With whom did you meet in relation to these other matters?

A I normally would go with either Mr. Risher or Mr. Muh, and sometimes both of them, plus one of the Newburgers or sometimes two of the Newburgers or sometimes two of the Newburgers and one of the Sterns, and we would meet with one or more representatives of the New York Stock Exchange -- usually two members of the New York Stock Exchange staff.

Q Will you tell the Court and jury what you did on these initial meetings with the New York Stock Exchange staff?

A From the time the New York Stock Exchange had requested status reports and I believe one of the Newburgers had written to the exchange in compliance with those requests telling them what the status of the reorganization was and giving reasons why the Exchange should not immediately liquidate the firm, and these meetings we had, the face-to-face meetings, were to set forth what steps were being taken, what the probability of the new capital being realized was and who was objecting to the transfer agreement, what were the negotiations that were going on, what would a pro forma balance sheet look like, what would the new management group be comprised of, what experience they had, who were they, what was their relationship to the partnership.

Q Will you tell the Court and jury what else you did in the meetings with the New York Stock Exchange during this period, if anything?

A I did very little. Most of the talking was done by members of the New York Stock Exchange, members of the partnership, and Mr. Risher and Mr. Muh, and really what was happening was the exchange was telling us what their requirements were for continued extensions of time. It was like the door would be closed imminently unless we gave them a reason why they believed we would be successful in saving the situation.

Q What did the Exchange do with respect to the extension of time?

A They gave us several, I think maybe as many as three, extensions and each time they asked us to get letters from those people who had given notices of withdrawal saying they were either withdrawing the notice or postponing the effective date, and I believe at each time those letters were gotten and submitted to the Exchange showing that in fact progress was being made.

Q Is there anything else that was done or that you did with respect to the New York Stock Exchange during this period?

A I think at some point, probably in December, we were able to tell them that Mr.Aixala had indicated he would subordinate the Bacardi stock and that would be the new capital the Exchange felt was a requisite to any reorganization. I believe they requested at that time a submission of a background report on him and eventually made a personal visit to the Exchange. I don't believe I was present at the meeting between the Exchange officials and Mr. Aixala.

Q In addition to dealing with the New York Stock Exchange and the other matters that you testified about last Friday, which you did during this period for Newburger & Loeb, did you have any dealings with respect to any of the leases of Newburger, Loeb, specifically, the lease at 1 New York Plaza?

A Aside from attending a few initial meetings in, I think, the last week in August and the first week or two of September, I personally didn't have anything to do with the New York Plaza lease. That was turned over to the Finley Real Estate Department and although I got status reports, in the normal course I would meet Neil Underberger or one of the partners from the Real Estate Department and ask how we were doing, but I really didn't participate in those negotiations or the transactions that led to the buy-out of that lease.

Q Did you do any legal work with respect to the basketball team?

A No. That remained a matter that Golenbock & Barell continued to supervise.

Q In addition, during this period of time, did you meet with various attorneys?

A Yes.

Q Were the attorneys given copies of the correspondence agreements that were being prepared --

MR. MANDEL: I object to the leading.

MR. SHAW: I withdraw it.

Q You met with various attorneys --

MR.SHAW: May this be marked a Plaintiffs' Exhibit for identification?

(Plaintiffs' Exhibit 52 was marked for identification.)

Q I place before you Plaintiffs' Exhibit 52 for identification and ask you if you recognize it.

A Yes.

Q Does that relate to Newburger, Loeb?

A Yes.

Q Is that a document prepared by Finley, Kumble?

A Yes.

MR. SHAW: I offer this document in evidence.

MR.GRUTMAN: No objection.

MR. ESTERMAN: No objection.

MR. MANDEL: I object to that. He says it is a document prepared by Finley, Kumble. He doesn't say what was done with it, it has no probative value. I don't think it is terribly important but I think if they want the document in they have to say something more than that.

THE COURT: Sustained.

Q Did you have a distribution list for mailing of matters having to do with these negotiations?

A Yes, mailing and hand delivery.

THE COURT: What kind of matters did you mail and hand deliver under this distribution list?

THE WITNESS: Every draft of the agreement, the proposed agreement, almost every piece of correspondence that came solely to me, as opposed to being distributed to everyone else, was usually duplicated and distributed to everyone on the distribution list.

THE COURT: This 52 for identification --

MR. MANDEL: Does the witness know this of his own knowledge?

THE WITNESS: Yes. This was my distribution list prepared by me and my secretary.

x

(Plaintiffs' Exhibit 52 for identification was received in evidence.)

Q Without reading this lengthy document to the jury, Mr. Persky, will you tell us how many lawyers received copies of the various documents that were prepared -- lawyers or members of law firms?

A There are 16 different law firms indicated on this list and at least one copy of every document went to each person or each firm on this list.

Q Will you give us the name of the attorney and law firm under No. 15 on the list?

A No. 15 was Mr. Philip Mandel, at Golden, Wienshienk & Mandel.

Q I believe that on Friday you had testified with respect to a meeting which took place on February 11 of 1971. Can you recall that day?

A Yes.

Q I believe you indicated that prior to that time you had had various conversations with Mr. Bamberger about Mr. Burak. Can you recall that?

A I remember one conversation prior to the 11th about Mr Burak.

Q Where were you on February 11, 1971?

A At the Finley, Kumble office.

Q Will you tell us who else was present on that occasion?

A There was one or more representatives from each firm listed on the distribution list. There were some of the general partners and some of the limited partners and some of the subordinated lenders from the partnership. Mr. Risher and Mr. Muh were present. Mr. Bamberger and Mr. Rosenbloom were present. They were both attorneys workingwith me at Finley, Kumble. There were other people on the premises but I am giving the names of the people concerned with the Newburger, Loeb transaction.

Q Where were the premises located at this time?

A 477 Madison Avenue.

Q Will you tell the Court and jury in your own words what happened on that day?

A I want to make one minor correct: In relationship to representation from the distribution list, no one from Mr. Mandel's firm was present on the 11th.

Q Tell us what occurred on the 11th.

A On the 11th we were prepared to actually transfer assets and issue the securities of the corporation to the individuals who had been former general partners, limited partners and subordinated lenders of the partnership. So the people assembled to execute, review and make the final changes in the documentation, which is now represented in that bound volume that has been in the courtroom --

Q What occurred?

A We spent either from late morning or early afternoon until the early morning hours of the next day making changes, negotiating last minute concessions back and forth and executing documents. I don't think any portion of the agreement at the beginning of the day was exactly the way it was finally executed, because each attorney among those presented suggestions, additions or corrections. So that we were constantly trying to get a concensus of opinion as to what was fair to everyone concerned and what was feasible for the ongoing business.

Q On February 11th was Exhibit 24 executed, that is, the transfer agreement, effective as of December 31, 1970?

A Yes.

Q Were various schedules and exhibits --

MR. MANDEL: Your Honor, I am objecting to the statement "effective as of December 31."

THE COURT: Sustained. It was an instrument that was executed, I take it.

Q Was a paper signed on February 11th?

A Yes.

Q What was the effective date of that document?

THE COURT: No, sustained.

Q Is it an instrument what has been placed in evidence as Exhibit 24? Have you seen it?

A I don't remember the number. If it is what you showed me on Friday -- yes, this is the document.

Q Can you recall what if anything occurred at this meeting in relation to or involving the firm of Rosenman, Colin, Kaye, Petschek & Freund?

A Some time during the evening hours Mike Bamberger came in and I believe I was in my office, as opposed to the library, where everyone was assembled, and told me that PaulBurak had advised him that he was unable to give an opinion letter, and Mike wanted to know what we should do. I said "Let's go in and tell everyone."

So we went back into the library and I told the assembled attorneys and individuals that the Rosenman firm had just informed us that they could not give an opinion, and someone in the room, one of the attorneys, and I don't know who at this time, asked whetheror not we had looked or anyone had looked into the problems raised by the Rosenman firm, and in fact we had looked at Section 98 which seemed to be their area of concern and in fact we had found a case in the Supreme Court in Kings County which led us to believe, among other things, that Section 98 was not a problem.

Q What did youdo?

A After the suggestion was made by one of the attorneys, that since we had looked into it, that we might prepare a letter opinion as special counsel to the partnership -- when I say "special counsel," that night we were presenting the corporation and so we had a problem of representing the partnership without the consent of everyone else present. Everyone decided that it did not seem to be an insurmountable obstackle but wanted to see a draft opinion. I went back to my room, got a secretary in and Mike and I dictated a draft opinion, which we then took back to the library, perhaps a half hour or 45 minutes later, circulated it around the room for comment.

Q What time wasthis, approximately?

A My recollection is that it would have been 9:30, 10 o'clock at night.

Q What happened after that?

A There was agreement, finally, on the final version of that opinion letter. We had it typed in final form, duplicated, signed and it became one of the closing documents.

MR.SHAW: May I have just a moment, your Honor?

(Pause.)

Q I place before you additional Defendant Finley, Kumble Exhibit E and ask you if you recognize it.

A I do.

Q Is that the opinion letter?

A Yes, sir.

Q Does thatletter, E, set forth your opinion as of February 11, 1971?

A It does.

Q Does that letter, E, set forth your opinion as of today's date?

A It does.

Q Will you tell the Court and jury the basis for your opinion?

THE COURT: At what point in time, Mr. Shaw?

Q As of February 11, 1971.

A Mr. Burak had raised the issue of whether or not Section 98 of the partnership law required a signature from each and every limited partner regardless of their status as of February 11th. We had researched that problem, and the particular subsection of the partnership law, 98, that concerned him, was a clause which I have to paraphrase, unless someone here has a copy, but it basically says that without the consent of all the limited partners, the general partners can't do anything which would prevent the business from being continued.

As of February 11th, that evening, we were in this fact situation: Mr. Gross, through Mr. Mandel, and Mr. Silverman, through Mrs. -- rather Mrs. Bleich and Mrs. Donoghue for Mr. Silverman said "We don't want the partnership to continue in business, we want to liquidate." The New York STock Exchange had said "If you don't have a reorganization agreement, we are going to close you up tomorrow morning."

The partnership agreement, as I read it, seemed to say that the general partners could terminate the business at any point and the case we had found said the partnership agreement could override the partnership law. So we had three or four bases for saying that particular subsection was inapplicable because, A, the case said that the partnership agreement could override Section 98, and I believe that was the only case that we could find and it seemed to be good law and made sense, secondly, even if that case was inapplicable, what was happening was not an act which was stopping the business, the business was going to be stopped either because Mr. Mandel's clients and Mr. Silverman's clients had their way or because the New York Stock Exchange was going to close us up, and Mrs. Bleich and Mrs. Donoghue had said "We don't want the business to go ahead, we want to withdraw."

So it doesn't seem the statute was designed to protect someone who said they didn't want the business to go ahead. For all of those reasons, both on the law and the facts, I believe, and I still believe, that Section 98 was not applicable to the particular situation we then faced.

Q At the present time is there any other basis for your belief?

A I think I have covered the elements.

MR. SHAW: No further questions.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q I want to read the specific statutory language of Section 98. The statute provides as follows, Section 1:

"A general partner shall have all the rights and powers and be subject toall the restrictions and liabilities of a parner in a partnership without limited partners except that, without the written consent or ratification of the specific act, all the limited partners, a general partner or all of the general partners have no authority to, A, do any act in contravention of the certificate, B, do any act which would make it impossible to carry on the ordinary business of the partnership."

There are then four other provisions which I shall not read since I don't believe they have any applicability.

Let me ask you as to Subsection 98: On the night of February 11, 1971 did you believe that the opinion which you rendered or the act of the general partners in transferring the assets from the partnership to the corporation was in contravention of the certificate.

MR. MANDEL: I object to the leading.

THE COURT: Doesn't he have a point there?

Q What was your opinion, Mr. Persky, on February 11th, concerning the applicability of the certificate of the partnership insofar as the transfer of the assets from partnership to corporation was concerned?

A Without the question, the general partners had the right to transfer assets and, in fact, there is a provision in there that contemplates the transfer to a corporation.

Q Do you know whether or not the Executive Committee of the partnership had passed upon the proposal?

A Yes.

Q What was the act of the Executive Committee concerning the transfer of the partnership assets to the corporation?

A They had approved the transfer.

Q I invite your attention specifically to Subsection B of Section 98, which says that the general partners shall not do "Any act which would make it impossible to carry on the ordinary business of the partnership."

Did you consider, Mr. Persky, whether or not the transaction involved the "ordinary" business of the partnership?

A Yes.

Q Did you regard insolvency --

THE COURT: No, no --

Q What was your view about the insolvency of Newburger, Loeb on February 11, 1971 as it related to the ongoing donduct of the "ordinary business of the partnership."?

A Insolvency was not the word that I was thinking about on February 11th. The word I was thinking about ws "liquidation" which was the word the New York STock Exchange had said was going to happen if we didn't do something on February 11th to bring in new capital.

Q What was the relationship of liquidation, as you conceived it, upon the so-called ordinary business of the partnership?

A The order business of the partnership was being a member of the New York Stock Exchange and conducting a securities business. The next morning there actually, because that was the practice -- a bell would have rung on the New York Stock Exchange and the business stops and they would have suspended --

MR. MANDEL: I object to this. Mr. Persky is prophesizing about the New York Stock Exchange, what they would have done, and so forth. I think that is improper for him to say that is what he thought would happen.

THE COURT: Objection sustained.

Q Had the partnership been informed of the New York Stock Exchange intention of what they intended to do the following day?

A Yes. I believe there is a letter from the Exchange setting forth what theyw ere going to do.

Q What were they going to do on February 12, 1971, according to that letter?

A They were going to suspend Newburger, Loeb from membership and ask for liquidation.

Q Were you familiar in 1971 with the procedure or ceremony of what went on at the New York Stock Exchange whether such a suspension occurred?

A Yes.

Q What was that practice?

A They would ring a bell, business would stop on the Exchange and a suspension would be announced.

Q If such a suspension had been announced on the following morning, what was your opinion on the night of February 11, 1971 as to whether or not Newburger, Loeb & Company could continue its "ordinary business?"

A There would have been no continuation of the ordinary business.

Q Was that a factor which was in your mind when you gave the opinion letter, Exhibit E in evidence?

A It was one of the factors, yes.

Q In addition to the others yo told his Honor and the members of the jury in response to the questions put to you this morning by Mr. Shaw?

A Yes, sir.

Q Had you in coming to the opinion which you rendered considered what you thought the policy, the legal policy, underlying Section 98 of the partnership law was?

THE COURT: Come on, Mr. Grutman. Mr. Shaw asked him what the basis was and I don't want your answer, I want the witness's answer.

MR. GRUTMAN: I don't believe that question was asked.

THE COURT: If you ask him what are all the factors he considered --

MR. GRUTMAN: Very well.

THE COURT: -- and when he has done that if there are some you are aware he has omitted maybe we can refresh his recollection.

Go down the litany of all the factors you considered on that night, Mr. Persky.

A We had Subsection B, is it F98?

Q Yes, that is correct.

A We talked about an act making it impossible to continue the business. In my mind, explicit -- not even implicit -- explicit was that there was a business to be continued. There were varying factors at work here and one position that was taken by Mr. Mandel, on behalf of Mr. Gross, and Mr. Silverman on behalf of Mrs. Donoghue and Mrs. Bleich, was that they did not want the business to be continued, they wanted it liquidated unless Mr. Gross got what he wanted to get. So here is one group saying to stop and liquidate, and the New York Stock Exchange is saying "Tomorrow morning we are going to suspend you from membership and you are going to have to stop business." Don't forget, this is evening, the market is closed, the Pacific Coast Exchange is closed and we are not in business, we are not selling stock, doing anything, except there may be a night crew working down there with some papers.

So in my mind there was no business to be continued. In addition, I believed that once a limited partner had given a notice of withdrawal, that they had in effect said "I really don't care whether the business continues or not, I want my money back."

So that they were saying in their notice of withdrawal that Section B is no longer needed to protect them because they have made their decision, they want out. "As far as I am concerned, the business is over."

MR. MANDEL: I object, your Honor, to what he says they said --

THE COURT: This is his construction. I overrule the objection on the basis that this is his construction in his mind as to what their position amounted to as the basis for his opinion.

Am I right in that?

THE WITNESS: Yes, sir.

THE COURT: Go ahead.

A In addition, these were factual bases, but there was the partnership agreement which said, as I read it, that the general partners could stop the business, or the general partners could transfer the assets to a corporation. These provisions seemed to be somewhat in conflict with Section B of Section 98, but we had a case --

Q Do you remember the name of the case?

A One of the names was Mist Properties.

Q Is that a New York State case?

A Yes.

Q Decided in the State Court rather than in the Federal Court?

A Right. We were dealing with a state statute. That was the only case we had found. We had found no contrary opinion at that time. That case said that when you sign a partnership agreement, you can agree to do something or give up a right that Section 98 gives you. So in addition to all the other factors, we read the law as being that the partnership agreement could override Section 98. That was a separate and distinct reason and for all of these reasons we believed that it was proper at that time to permit the transfer of assets.

Q Have you now exhausted your recollection, all the considerations that were in your mind on the night of February 11, 1971, the time you delivered the opinion letter which you did and which is received in evidence in this case?

A Could I look at the letter just once more?

Q Certainly.

(Pause.)

A There was one other factor we considered and set forth in the letter.

Q What was that, sir?

A We considered the fact that if there were a liquidation that there was a substantial and high probability that all the general partners would lose their money, that all the limited partners would lose their money and a good chance all the subordinated lenders would lose their money in liquidation.

Q In liquidation, as you understood it on February 11, 1971, what would have been the effect on either getting or losing money on a withdrawn general partner, such as Mr. Gross?

A A general partner who has withdrawn remains liable for obligations of the partnership that were incurred prior to his withdrawal.

Q In light of that, what would have been the effect of the withdrawn general partner, Charles Gross, as far as getting his money back?

MR. MANDEL: In his opinion?

MR. GRUTMAN: Yes, of course, Mr. Mandel.

A It was my opinion, and not solely my opinion, because other people expressed it, that there would be no money at all for either the general partners who had stayed in or the general partners who gave notice of withdrawal.

Q In your opinion, what would have been the effect on a liquidation not only as to the limited partners but to withdrawn limited partners, like Mrs. Bleich and Mrs. Donoghue?

MR. MANDEL: I object to that.

THE COURT: Sustained.

Q To limited partners who had tendered their notice of withdrawals? No question about that? Would they have gotten their money back?

A No.

MR. MANDEL: I object, in his opinion.

MR. GRUTMAN: That is prefixed to all these questions, your Honor.

THE COURT: Just so that is clear.

Q Was that opinion solely yours?

A No.

MR.MANDEL: I object.

THE COURT: We are only exploring --

MR. GRUTMAN: What was said?

THE COURT: -- his opinion. I take it the question probably better be phrased as to what others may have said to him rather than a leading question.

MR. MANDEL That is hearsay, your Honor.

THE COURT: No, I will allow that.

Q In the negotiations that led up to February 11th were there other people who had expressed opinions on what chance,if any, there was of the general partners, the withdrawn general partners and the limited partners who had served notice of withdrawal, of getting their money back?

A Yes.

Q What had been said and tell us by whom, if you can?

A I specifically remember statements by Ronnie Itzler of Ballon, Stohl & Itzler, and Kenneth Bialkin of Wilkie, Farr, Gallagher and by Steefel, of STroock, Stroock & Lavan, and almost all the attorneys on the list, with the exception of Mr. Silverman and Mr. Mandel, that they were in unanimous agreement that liquidation would result in general partners, whether or not they had given notices of withdrawal, and limited partners, whether or not they had given notices of withdrawal, being completely wiped out in a liquidation, and Mr. Bialkin was somewhat less concerned on subordinated lenders, he believed with some luck there would be something left for them.

Q About what time was the final form of the opinion letter circulated, read, commented upon and approved by counsel who were at the February 11th closing?

A I would say approximately somewhere between 9 and 10 o'clock at night.

Q Was Mr. Burak still in attendance at that time?

A My recollection is yes.

Q After the opinion letter prepared by the Finley, Kumble firm and signed by you as a partner of the firm and had been circulated and approved, did the various parties to the agreement sign the agreement?

A Yes, sir.

Q Did there include Mr. Burak's client?

A Yes, sir.

Q At the time that Mr. Burak's client signed, did he make any objections?

A No, sir.

Q Did any attorney express any objection to the opinion letter which Finley, Kumble rendered that night?

A That night, no.

Q Or at any time thereafter, other than Mr. Mandel?

A No, not other than Mr.Mandel.

Q As to the circulation or consideration list, which consists of 16 designated people, besides these 16 people, Mr. Persky, were you in touch with other organizations or entities about the progress of negotiations regarding the transfer agreement?

A Yes, sir.

Q Were you in touch with the New York Stock Exchange?

A Yes, sir.

Q Were you in touch with the Securities & Exchange Commission?

A Personally, no.

Q Was someone in the Finley, Kumble firm --

MR. MANDEL: I object.

THE COURT: Sustained.

Q Was anyone on behalf of Newburger, Loeb, to your knowledge, in touch with the SEC?

A Yes.

Q And to your knowledge --

MR. MANDEL: Objection.

THE COURT: You are going to open the door to the matter we discussed the other day. Objection sustained. Strike the answer.

Q I think you testified on Friday that there was an agreement which was executed on December 31, 1970, is that correct?

A Yes, sir.

MR. MANDEL: I object to that. What he testified on Friday was a paper which did not have the force of an agreement, which was executed December 31st, called the preliminary agreement.

Q The preliminary agreement, I will take that phrase, was that agreement signed by or on behalf of Mrs. Bleich?

A I believe it was.

Q I believe we had the letter from Golenbock & Barell, signed by the firm, expressing an intention to recommend that preliminary agreement to Mrs. Donoghue downthere in Australia, correct?

A Correct.

Q As of that date, Mr. Persky, did you believe

Bleich and Donoghue were going along with the proposed transfer agreement?

A I believed that Mrs. Bleich was. I didn't know about Mrs. Donoghue.

Q At some time after December 31st, and before February 11th, did you learn whether or not somehow Mr. Bleich had had a change of heart?

A I believe I learned some time subsequent to December 31st.

Q From whom did you learn that?

A I think both from Mr. Silverman and Mr. Mandel.

Q Did you try to deal with or see Mrs. Bleich personally?

A We requested through Mr. Silverman a meeting with Mrs Bleich and Mr. Silverman, or any other persons she would feel comfortable with.

Q Did they permit you to see her, speak with her?

A They refused us access to her either directly or by phone.

Q Up to February 10th, however, what did you believe as to whether Mrs. Bleich would or would not go along with the transaction?

A I believed there was still a substantial chance she would go along with the transaction.

Q And as to Mrs. Donohue, I think I had become fairly well convinced that she would not go along with the transaction.

Q Did you advise the New York Stock Exchange of those facts?

A Yes, sir. In fact, we advised the New York Stock Exchange as to a more stringent situation, that is, we said we now contemplated that we might have to proceed without either Mrs. Bleich or Mrs. Donoghue or Mr. Gross agreeing to accept securities of the corporation, and the New York Stock Exchange had first said no --

MR. MANDEL: I object to this, your Honor.

THE COURT: Yes.

Q You advised the New York Stock Exchange?

A Yes.

Q Do you recall whether or not after you gave that advice the New York Stock Exchange did or did not do anything?

MR. MANDEL: I object.

THE COURT: Well, at this point I consider the door to have been opened and I overrule the objection.

A At first it is my recollection the New York

Stock Exchange said "You cannot go forward. We want everyone's capital to remain in the business."

At some point between December 31st and February 11th they had a change of heart and said "If you reserve it, in effect, remove it from good capital, you may proceed."

Q Please, I would like you to explain what you have just said in a way in which it may be more comprehensible by law people. You used the phrase "reserve it" and "take it out of good capital."

Will you please, in shirtsleeve language, explain those terms to us as they applied to what treatment was made of Bleich and Donoghue and Gross?

A I think at the end of Friday I was describing this fraction that the New York Stock Exchange uses, or was using in 1971, and in effect what they said is for every $20 that you owe somebody, you have to have $1 in liquid assets. So they didn't count in dollars at the bottom of this fraction, 20 at the top and a dollar at the bottom, things like furniture, the New York Stock Exchange seats, stock that you couldn't sell easily. In other words, it had to be almost cash or cash equivalency -- telephone stock would have been good, because you could sell it easily.

Whenyou reserve money on the balance sheet, set up a reserve for something, in the context of what we are talking about, they were saying you couldn't use Bleich, Donoghue or Gross dollars at the bottom of that fraction. In other words, they didn't count. They were treating them like a desk and saying if they have a claim, whether it is good or bad, they won't decide now, but "We are going to peanlize you for the claim being in existence by saying treat it like a desk."

So it was reserve and did not count as good capital.

Q What financial treatment was made of these claims?

A On the balance sheets of the corporation there was a number inserted which was equivalent to the money that Mrs. Bleich and Mrs. Donoghue said was owed to them, plus the number Peat, Marwick & Mitchell said was possibly owed to Mr. Gross before offsets, and there was a little footnote indicated and the corporation said "We are doing this because the New York Stock Exchange asked us to do it but we are not admitting that we owe the money."

Q Did you show that document to the New York Stock Exchange before February 11th?

A I don't know whether a pro forma balance sheet, a projected balance sheet, was showed to them.

Q Among the people who attended at this closing on February 11th, do you recall whether or not there was a representative of the New York Stock Exchange present?

A Mr. Dilger was at one or both of the closings, but I think it was the February 11th closing --

Q Mr. Dilger belonged to what organization?

A Mr. Dilger was an employee of the New York Stock Exchange.

Q Do you know what division or branch of the Exchange he operated in?

A I think in those days he was with the department of member firms.

Q Was that the departmentof the Stock Exchange which had to do with whether or not Newburger, Loew & Co., Inc. would be admitted to the Exchange?

A Yes.

Q Was he present when the questionabout the opinion letter came up?

A I don't know.

Q Do you know whether he is an attorney or not?

A I don't know.

Q Prior to February 11th and after December 31st, do you have a recollection of meeting with Mr. Mandel on a number of occasions?

A After December, prior to February?

Q That is correct.

A I really only remember two occasions.

Q On the last of the occasions, what would the date be, prior to February 11th?

A That would have been the Golenbock & Barell meeting.

Q What is the date of that meeting?

A I don't have an independent recollection.

Q Could you give me an approximation as to how long before the closing of February 11th, the so-called Golenbock & Barell meeting took place with Mr. Mandel?

A I would say somewhere in the two weeks prior to that.

Q At that meeting, the last of the meetings you had with Mr. Mandel, did you exhibit to him the then latest draft of the proposed transfer agreement?

A Mr. Mandel had gotten, in the ordinary course, every draft at the same time everyone else got it, except for the final executed document, on February 11th.

Q Did you send him that, took, after closing?

A I think at some point we gave him one, but I dont know if it was the next day.

Q In the last meeting at the Golenbock & Barell office did you have a discussion with Mr. Mandel where he voiced his view about the propriety of the proposed transfer agreement?

A The discussion at the Golenbock & Barell office did not revolve around the legal niceties of the transactions; it was a negotiation session designed or called for the purpose of resolving the differences between the general partners and the limited partners and the subordinated lenders, the corporation, the partnership and Mr. Gross, and it was in that context that the discussion took place.

Q Did you ever hear the phrase "temporary restraining order" or "injunction" used in either of those two discussions with Mr. Mandel after December 31st and before February 11th?

MR. MANDEL: I object on the grounds of irrelevance.

MR. GRUTMAN: On the issue of good faith, your Honor, at the time of the bringing of the lawsuit?

THE COURT: Why is it relevant?

MR. GRUTMAN: On the issue, your Honor, that Mr. Mandel was aware of an agreement he thought was improper and I offer to prove through this witness that an opportunity was offered to Mr. Mandel to test the validity of the --

THE COURT: I sustain the objection.

MR.SHAW: Your Honor, Mr. Mandel has made an argument based upon the date of the filing of the complaint in this case, which is shortly after February 11th and I think it is relevant that a complaint was filed in behalf of Newburger,Loeb Corporation and Mr. Mandel at that point may or may not have been saying thints about certain litigation on behalf of his client. I think it is relevant as to good faith.

THE COURT: Objection sustained.

Q You were familiar with the provisions of the transfer agreement, correct?

A Yes, sir.

Q Could you briefly tell us how the general partners were treated in the transfer agreement, the limited partners, and the subordinated lenders? What did they get?

THE COURT: The agreement speaks for itself.

MR.GRUTMAN: It is a long and intricate agreement, your Honor --

MR. MANDEL: May I be heard, your Honor? So long as Mr. Persky says this is his opinion, I think it is relevant on the question of his good faith and I expect to cross examine him on it and therefore I will not object to his statement of his understanding of that agreement.

THE COURT: You may proceed.

Q AS I ask you to parse the agreement, I ask you to abandon lawyers jargon. Under the agreement, what did the partners, the general partners, the limited partners and the subordinated lenders get under the provisions of the transfer agreement?

A The general partners got common stock. There were two classes of common stock, some voting and some non-voting, and the basic distinction was that those general partners who continued as working members of the corporation got voting stock and I think some non-voting, and those who did not continue got non-voting stock, and that distinction was because of a New York Stock Exchange requirement at that time. The subordinated lenders got, in effect, subordinated instruments, not very different from what they had before except the one that owed them the money was the corporation, and the limited partners originally were going to get only preferred stock or notes and we changed it several times to meet requirements of the Exchange, because in addition to this ratio they had of debit to capital, they also had another ratio of -- quite independent of that -- of the amount of loans to the corporation that were subordinate and preferred stock to common stock, what they called hard equity.

So we kept changing that to meet their requirements, so there was a combination package of securities.

Q Was the formula worked out in negotiations that went on in the various meetings that were the subject of your meetings Friday and today?

A Yes, sir.

THE COURT: The limited partners got a combination of preferred stock and notes?

A That is my recollection. I would really like to look at that agreement.

(Document handed to witness.)

Q Did the limited partners get some combination of convertible preferred stock and notes?

A Convertible preferred and notes.

Q Was convertible preferred stock, Mr. Persky?

A Preferred stock, if you are liquidating a corporation, gets back assets, if any, prior to common stock, but it doesn't share in the profits. It gets a fixed return, much like a bank account. In order to make it more attractive to an investor, you also make it convertible into common stock, so that if the business is very successful, the preferred shareholder can convert to common and benefit from any increment in value of the common stock.

Q Was that formula or format which was worked out about what would be obtained by each of the general partners, each of the limited partners, the product of the negotiations that went on over these many weeks?

A Yes.

Q Were each of the people who belonged to those respective classes treated alike?

MR. MANDEL: I object, leading.

MR. GRUTMAN: Withdrawn.

Q Was there any difference made among general partners, limited partners and subordinated lenders?

MR. MANDEL: I object to leading questions. There is no foundation. Mr. Grutman is leaving out the difference between withdrawn general partners and ordinary general partners.

THE COURT: Well, this is the problem of not referring to the instrument.

Q From your recollection of the instrument, Mr. Persky, was there any difference made among individuals who belonged to the same class, whatever the class was?

A Yes.

Q What differences were there?

A I don't think there were any differences as to subordinated lenders and I don't think there were any differences as to limited partners. Within the general partnership group there were differences.

Q Explain those.

A First, there were two categories of general partners in terms of capital. There were those who had deficit capital and those who had positive capital --

Q As we come to these exotic words you live with, please explain the difference between good capital and --

A All right. On the books of the corporation, assuming -- correct that, on the books of the partnership, assuming the partnership was going to continue in business, that was a value of each partner's account. If he had started with a hundred dollars, as the business loss or made money, the hundred dollars would go up or down, might go down 10, might to 110. Some people had put in, in addition to their minimum requirement, additional capital, and that figure was included there. As ofthe time that we are talking about, there had been so many losses in the corporation --

Q Partnership or corporation?

A Correction: Partnership -- that some of the partners' capital had not only been diminished to zero, but they actually owed money to the partnership, because they had lost so much more and if they had it available they should have reached in their pocket and put it back into the partnership. There were others, because they had not merely their minimum capital but additional capital who had what we called good capital, and that was our shorthand way of saying they didn't owe money in, on the books of the partnership, on an on-going basis, there was something due them.

Q What differentiation was made among these two classes you knew just described?

A It is my recollection that those with good capital got something besides ordinary common. I don't remember what it was.

Q Do you remember how many general partners had good capital?

A I think it was three, might have been four.

Q Do you remember who they were?

A Mr. Gross was one of them.

Q Do you remember how much good capital he had on the books of the partnership?

MR. MANDEL: As of what date?

MR. GRUTMAN: December 31, 1970.

A I later saw a Peat, Marwick financial statement which showed a number, I think, of 129,000.

Q Was there anybody with good capital greater than that?

A Yes. It was the estate of Morris Newburger, I think.

Q How much did they have?

A Several hundred thousand dollars.

Q How about Leo Stern?

A He had positive capital.

Q Do you know how much?

A I don't remember.

Q Do you remember $600,000? Does that refresh your recollection?

A Yes.

Q Did the estate have Morris Newburger after proof of this transfer?

A Yes.

Q Did Leo Stern approve of the transfer?

A Yes.

Q Did all the other general or limited partners, with the exception of Mr. Gross, Mrs. Bleich and Miss Donoghue, approve?

A Yes.

Q Was there some forgiveness or concept of forgivenness he involved in the discussions?

Q Yes.

Q Would you explain the forgiveness concept and, again, I will ask you to please do it in a way comprehensible to everyday lay people.

A There were the partners who owed money back to the partnership. They had what we call the deficit capital.

Q Were these most of the partners?

A Yes.

Q All right.

A The corporation was going to get as an asset the obligation of these partners to pay back something. The limited partners and the subordinated lenders had an interest in seeing that it was all paid back, to the extent possible, and it was generally agreed that at that moment in time nobody had the cash in their pocket to pay that back but we wanted --"we" representing the corporation, and the limited partners and subordianted lenders staying in and the general partners with good capital, some assurance the money would be paid back, and there was one common source for that money that seemed to be applicable to everyone, and that is the partners had paid taxes on huge profits in prior years, before the losses started, and they were going to get tax refunds. So, in effect, they gave the corporation documents which said they would take their tax money and pay it back to the corporation. Their attorneys argued that if they do that, that means they are going to be bereft of funds, they are giving up everything they have and they argued they should be left with something to walk around with, to start a new life, because only a few of them were going to continue with the corporation.

The attorneys for the limited partners and the subordinated ledners said "It is not to our interest to to this. We want all of the money brought into the corporation."

The corporation of course was happy to get as much of the money back, and there then ensued a negotiation but it was basically between the limited partners and the subordinated lenders and the general partners, who comprised the partnership, in which it was finally decided there would be a certain forgiveness, really saying "You don't have to give us every last cent you are getting back on the tax refund, you only have to give us the major part of it," and they reached numbers and documents were executed that were really the partnership saying to the individual general partners "You don't have to turn everything over to the corporation."

Q Do you recollect what that formula was?

A No. I think it varies from partner to partner. There was a second part to that: There were some people who owed small amounts, in the general context, and they were forgiven completely their indebtedness.

Q Was there a cutoff number where complete forgiveness was --

A I think it was 25,000.

Q Was there a sliding scale concept as to other partners?

A Yes. I don't remember the formula.

Q Was the sliding scale concept --

MR. MANDEL: I object to the leading.

THE COURT: Yes.

Q How was the sliding scale concept applied?

THE COURT: He wants to know what was the concept.

Q Do youknow what the sliding scale concept was?

A I don't remember the formula.

Q Do you know how it was applied class by class?

A My recollection is thatthe formula once fixed among the general partners, the subordinated and the lenders was uniformly divided.

Q Could the deal have been accomplished without the forgiveness element, in your opinion?

A No, it was one of the many give and takes that took place between all these conflicting interests.

Q In the course of the gives and takes was there any intention to take anything away from Mr. Gross, Mrs. Bleich or Mrs. Donoghue?

THE COURT: I sustain an objection to the form of that question.

Q What were you doing in the gives and takes and the working out of the transfer agreement so far as the claims of Gross, Bleich and Donoghue?

MR. MANDEL: I object.

THE COURT: Read that back, please.

MR. GRUTMAN: I think it is a bad question, Judge. I will refine it.

Q In the transfer agreement what place was allowed for Gross, Bleich and Donoghue?

MR. MANDEL:I object.

THE COURT: I sustain an objection to the form of that.

Q Since Mr. Gross had operated not to go along with the agreement -- is that correct?

A Correct.

Q As of February 11th that was likewise the position of Bleich and Donoghue, is that correct?

A Yes.

Q What was to be done with their position in the partnership vis-a-vis the transfer of assets from the partnership to the corporation?

MR. SHAW: Objection, your Honor. I don't believe there is any testimony they had an interest in the partnership at that point.

Q Assuming that they did.

MR. SHAW: I still object.

THE COURT: Read that one back to me, please.

(Question read.)

THE COURT: Overruled. You may answer.

A The corporation agreed to assume certain liabilities, that is, moneys and claims of other people. At that moment in time, Mr. Gross, Mrs. Donoghue and Mrs. Bleich were among those persons whose claims were being assumed by the corporation. The partnership still remained liable, the corporation was additionally liable, and there was a clear dispute as to the amount, if any due.

Q Would you explain that? When you say the partnership was liable to the extent there was any money due, what do you mean by that?

A You mean the whole sentence?

Q Well, the whole concept.

A If I am a partner in a candystore with someone else and we owe money to someone and then decide to incorporate and the corporation assumes the liability, you don't as a partner get rid of that liability, you still owe to the person, but you have just added someone else who is liable, the corporation. So you have two people, if you are the creditor, to who to.

Q When the corporation assumed the responsibility of being a person to be looked to, did the corporation acquiesce in the claims made by Gross, Bleich and Donoghue?

A You mean the amounts of them?

Q Yes.

A No.

Q When the Buckley case was settled, had you ever met Mr. Gross?

A Yes.

Q Did you have any animous against Mr. Gross when the Buckley case was settled?

A No.

Q In making the arrangements which were made on behalf o your client, were you acting against Mr. Gross at that time?

THE COURT: Sustained

Q Were you animated by some animous against Mr. Gross?

THE COURT: Sustained. Let's avoid the leading here, please.

Q When you settled the Buckley claim, did you have any concern about Mr. Gross in making that settlement?

A Yes.

Q What was your concern about Mr. Gross when you settled the Buckley claim?

A I had two concerns.

The first concern was that since at that moment we did not know whether there would be a transfer of agreement of any type and there was a distinct possibility that the partnership would be liquidated, I was trying to bring in all of the claims that the partnership might have and that a receiver in bankruptcy might look for. So we were getting that assignment against Gross and Company, and indirectly Mr. Gross, because that would be an asset of the partnership.

Q Did you consider that to be your responsibility as an attorney?

A Absolutely.

Q For the client you represented?

A Because we were acting on behalf of the partnership at that moment.

Q Do you have an opinion as to what the result would have been had you done otherwise?

A It would have been a breach of our duty.

Q As attorneys?

A Yes. I had a second reason.

Q What was that?

A The partners, the limited partners and the subordinated lenders, had expressed to us, both orally and in writing, an example of which was Mr. Frank's letter --

MR. MANDEL: May we have this fixed as to times and places?

THE COURT: Yes.

MR. MANDEL: I object on the ground that there is no foundation.

THE COURT: All right.

A Almost from the first time I met anyone connected with the partnership, starting with Mr. Kayne, and eventually the Newburgers and the Sterns, I was advised they felt the partnership had claims against Mr. Gross.

THE COURT: When was this?

A This was in the fall of 1970 -- actually, as soon as I met Fred Kayne he told me he felt Charley misled him to join the partnership.

THE COURT:I amnot clear whether you are objecting or not, Mr. Mandel?

MR. MANDEL: So long as he is being specific as to who said what, I wouldn't object, and whether Kayne says he was wrongfully induced to join the partnership, that obviously has nothing to do with this case, but I will let it come in to show and I must. Whatever he says Newburger said or anybody else, I want the people who said it, whether they said it and what they said, rather than this broad brush.

THE COURT: Can you do that?

MR. GRUTMAN: I'll try.

Q Your first connection with Newburger, Loeb was in September of 1970, correct?

A It might be as early as the last week in August.

Q When you settled the Buckley case, that was in December?

A Correct.

Q In December of '70 had you had any instructions from any of the principals of Newburger, Loeb about Charles Gross personally?

A Instructions is not the proper word.

Q Had you had any communications from them?

A Yes.

Q What were they, and from whom?

A Ned Frank, Bob Newburger, Andrew Newburger had told me at meetings we had had in the fall of 1970 --

MR. MANDEL: Iobject and move to strike. The question was about December.

MR. GRUTMAN: No, it was not. Please, that is not the question.

Q The question is, up to December -- up to December -- had you had any communications, and I think you have told us that Robert Newburger, Andrew Newburger and who else --

A Ned Frank.

Q -- partners in Newburger, Loeb?

A Yes, who had given notice of withdrawal.

Q Had had communication with you concerning Mr. Gross --

MR. MANDEL: Your Honor, I thought we agreed we were going to be told when.

MR. GRUTMAN: I will do this but in my way. He can cross examine when it is his turn.

THE COURT: The problem is that all of this is wholly inadmissible and if he just said "I object" I would say it was sustained. He is willing to permit it to come in with specificity. This is all hearsay.

Q Can I come back to the second reason you had for settling the case?

A Yes.

Q When was that?

A In the discussions with Mr. Silverman, when he was representing Mr. Gross and Mrs. Donoghue and Mrs. Bleich, and then later with Mr. Mandel, it appeared that they took very lightly the claims of the partners and the subordinated lenders and the general partners against Mr. Gross.

MR.MANDEL: I object on the ground that there is foundation, because he is saying they took claims lightly.

THE COURT: Yes, strike out that answer.

We are going to take our recess at this point, ladies and gentlemen.

(Recess.)

THE COURT: Ladies and gentlemen, I want to put certain testimony in context here so that you can appreciate it in the framework of this case.

We have had testimony by Mr. Persky as to an opinion letter he gave on the evening of February 11, 1971, and there has been testimony with respect ot the factors he considered in arriving at the opinion expressed, the legal opinion, expressed in this letter. I permitted all of this testimony, and properly so, on the question of

Mr. Persky's making of this letter in the good faith that went into how it was arrived at, the question of his good faith and how it was arrived at.

I do want to say in this connection, though, that at the close of the case I will be instructing you that as a matter of law that the execution of this transfer agreement, which is Exhibit 24, without the consent of the limited partners, was in violation of this Section 98 of the partnership law.

I tell you that as a matter of law. However, the question of Mr. Persky's good faith in the opinion that he reached on the night of February 11th, which is embodied in Exhibit E, that is a question you shall have to decide, together with all the other questions you will have to decide in this case, at the close of the case, and I want to make it perfectly clear that as with all other fact questions that question is solely yours to decide, not mine to decide -- Mr. Persky's good faith -- and I have no opinion on that subject and I am not intending to express any opinion on that subject by reason of what I am saying to you at this point.

I wanted to put in context the proof that is coming in on that score so that you will see it in its proper setting. It is an issue of Mr. Persky's good faith and not an issue of what the law is.

I trust I have made myself clear on that subject.

BY MR. GRUTMAN:

Q Mr. Persky, after the Buckley case had been settled did you endeavor to prevail upon Mr. Gross to come back and participate in the new entity?

A Not participate. I tried to convince Mr. Mandel to convince Mr. Gross that it was in his better interests to accept the securities of the corporation, as were other general partners who claimed to have good capital, and that liquidation, which seemed to be what Mr. Gross was saying he wanted if he couldn't have his way, or cash at that time, was not in his best interests and certainly not in the best interests of Mrs. Donoghue or Mrs. Bleich.

Q Did you really believe that when you said that?

A I believed it then and I believe it now.

Q At the time you participated in these negotiations and the work you did in connection with the transfer agreement, Mr. Persky, were you part of any conspiracy against Gross, Bleich and Donoghue?

MR. MANDEL: I object to that.

THE COURT: No, I will permit that.

A No.

Q At any time at all did you participate in any kind of a conspiracy to forment litigation and hold off the turnover to Gross, Bleich and Donoghue whatever it is they might be entitled to?

A No.

Q Did you ever say to Mr. Mandel that unless he capitulated to your demands that you would do such things?

A Such things meaning your prior question?

Q Yes.

MR. MANDEL: I object to that.

THE COURT: Yes, sustained as to form.

Q Did you have any conversation with Mr. Mandel before the execution on February 11th about litigation?

A Yes.

Q When was the first time and place at which discussion about litigation took place in which you and Mr. Mandel had words?

A My recollection is the first time I met Mr. Mandel was at his office prior to the Golenbock & Barell meeting, and at thattime I told Mr. Mandel the list of claims that I believed that the limited partners, partners and subordinated lenders had against Mr. Gross. I told him also about the Buckley claim and I told Mr. Mandel "Let's put the claims of the partners, limited partners and subordinated lenders on the side for the moment," because these people had lived together and had strong feelings about one another, but here were the Buckleys, not partners, subordinated lenders or limited partners and Webster, Sheffield, and they had determined there was a claim against Gross and Company and I said "Here is one claim that has nothing to do with what we are talking about, did not arise out of the activities of Newburger, Loeb, and that is a strong claim" and that came up with the context of Mr. Mandel saying to me, in effect, although not the exact words, "You are full of hot air. There are no real claims" and I was trying to convince him there were real claims and probably would be resultant litigation --

Q Unless?

A Unless there was a resolution between all the parties. I was trying to at this point, although I was representing the corporation, make peace between Mr. Gross, his former general partners, limited partners, subordinated lenders, the corporation and the partnership -- it was not solely a conversation devoted to claims of the corporation and Mr. Gross.

Q Did you ever make any threats?

A No.

Q Did you ever exhibit to Mr. Mandel a proposed specimen of a complaint?

A Yes.

Q To your understanding, was that an acceptable legal practice?

A Yes.

Q Had it ever been done before in your practice in other matters?

A I have from time to time drafted a complaint prior to the instigation of litigation and said --

Q Instigation or institution, Mr. Persky?

A Institution.

Q Yes?

A And said to the opposing attorney, "This is what our claim looks like in writing. I am not filing this document, I am not giving it to a process server. Let's see if we can resolve our differences. Here is the claim in writing, you evaluate it" and sometimes that works, because people see the light, and sometimes it doesn't.

Q Is that what you were trying to do with Mr. Mandel and his clients when you exhibited to him the specimen complaint?

A Yes.

Q Were you still trying to make peace?

A Yes, and it nearly succeeded.

Q Do you know how mahy employees Newburger, Loeb had on Februaryll, 1971?

MR. MANDEL: I object.

THE COURT: Overruled.

A I would think it would be in excess of 200, but I am not --

Q You said in answer to the preceding question that your efforts to promote peace nearly succeeded. To what extent were you referring to --

A At the Golenbock & Barell meeting, the one where I handed Mr. Mandel the draft complaint, which was attended by representatives of the limited partners, general partners, subordinated lenders, Mr. Silverman was there, ther was a give and take back and forth between all the parties and there was a package arrived at which Mr. Mandel said he would recommend to Mr. Gross.

Mr. Mandel got up and said he would call Mr. Gross, left the room, came back 45 minutes later and said he was sorry he took so long but he was on the telephone all that time with Mr. Gross and did not have authority to settle along those terms recommended.

Q When Mr. Mandel was talking about settling with Mr. Gross, did he say anything about what effect settling or satisfying Gross would have on Bleich and Donoghue?

A That the package included a settlement on behalf of Bleich and Donoghue.

Q So far as you know, did he call Bleich and Donoghue or just Gross when he went out of the room?

A I only remember him saying he was calling Mr. Gross.

Q You say Newburger, Loeb had about 200 employees on February 11th?

A I think in excess of that. I don't remember the number.

Q As a result of your activities, did any of those people lose their jobs?

THE COURT: Sustained.

Q As a result of the signing of the transfer agreement, did Newburger, Loeb & Company and its employees stay in business?

MR. MANDEL: I object to that.

THE COURT:I will sustain that as to form.

Q As a result of the transfer agreement, were the 200 employees of Newburger, Loeb & Company continued in the employ of the new corporation?

MR. MANDEL: I object to that.

THE COURT: Sustained.

Did Newburger, Loeb's customers continue to get served in the forthcoming days?

THE WITNESS: Yes, sir.

THE COURT: All right, next subject, please.

Q As a resylt of the transfer agreement being signed, did Newburger, Loeb stay in business?

A Yes.

MR. MANDEL: I object to that.

THE COURT: Overruled.

Q Other than the compensation which you derived from the legal fees that were paid to Finley, Kumble for its legal services, did you derive any personal benefit out of the transfer agreement?

A If you include in the compensation a portion of the stock of Newburger, Loeb & Co., Inc., the answer is yes.

Q Was the stock of Newburger, Loeb & Co., Inc. paid in part to Finley, Kumble?

A Yes.

Q Was it paid as part of Finley, Kumble's fees for approval legal services rendered?

A Yes.

Q Up to the time the transfer agreement was signed, had there been any agreement that Finley, Kumble's compensation was to be --

THE COURT: No. Ask him how this came to pass.

Q How did it come about that Finley, Kumble received as part of its compensation some of the stock in the new corporation?

A After February 11, but before we submitted a final bill, because we had been paid from time to time, I was asked to have dinner with Mr. Muh and Mr. Risher, and I believe Mr. Kayne was back in New York at that time. We went to a steak house on 46th Street -- I don't remember which one -- and we discussed what the possible outstanding bill could be at that time, and Mr. Kayne and Mr. Risher and Mr. Muh expressed their strong feeling that they would like us to diminish the cash aspect of the bill and take some of the stock of the corporation in payment of our fee, in effect, show our faith in the viability of the coproration and its continued business by becoming partial owners.

Q And?

A I said that I would personally recommend that to my partners, and I did, and I got permission to accept part of the fee --

Q How much of the fee was accepted by way of payment through stock?

A $10,000.

Q Prior to this steakhouse meeting and subsequent to the closing itself, had there been any discussion that part of Finley, Kumble's fee was to have been paid in the stock of the new corporation?

A No.

Q Was your participation in that stock, Mr. Persky, pursuant to your arrangement of profit participation in the firm?

A Yes.

Q Any different from any other fees received by the firm?

A Well, we had a sliding scale, but in its category, it was the same as I would have gotten --

Q All right.

After the corporation was reorganized I think you said the subordinated lenders stayed in, is that correct?

A Yes.

Q Do you know whether or not the interest of the subordinated lenders was paid out in full by the new corporation?

A I was advised each and every subordinated lender was paid back in full.

Q To that extent was the agreement successful, so far as they were concerned?

THE COURT: Sustained.

Q In this lawsuit, Mr. Persky, you are one of the additional defendants on counterclaims, is that correct?

A Yes.

Q Do you know whether the counterclaims against you personally was interposed by Gross, Bleich and Donoghue at the time that they filed their original answer in this lawsuit?

A It is my recollection it was not.

Q In the original answer served back in 1971, do you know whether or not Gross, Blecih and Donoghue asserted certain counterclaims?

A Yes.

Q Did they assert those counterclaims just again the corporation and the partnership?

A Yes.

Q When the new corporation started to fail economically, were you added?

THE COURT: No, there is no foundation for that.

Q Were you added as an additional party defendant some time long after the original counterclaim --

THE COURT: Sustained.

Q How long after the original counterclaims were interposed were you added as an additional party defendant?

A I think approximately a year.

Q Could you fix the point in time?

A Not without refreshing my recollection.

Q February 28, 1972 is the date on which the additional counterclaims were filaed and the answering counterclaims were filed May 3, 1971, originally. Does that refresh your recollection?

MR. MANDEL: So stipulated.

A Yes.

Q WEre you aware of what the financial condition of Newburger, Loeb & Company, Inc. was at the time that you were added as an additional party defendant in February of 1972?

A I think it had just begun to lose some money. There was a profitable period.

MR. MANDEL: I object and move to strike. He thinks? Either he knows or doesn't kow. This is not a guessing game.

THE COURT: Sustained. Strike out that answer.

Q At the time that you were made an additional party defendant on these claims by Gross, Bleich and Donoghue, was your then law firm, Finley, Kumble, also added as an additional party defendant?

A Yes.

Q Have you seen the claims made against you and your law firm in the pleading of 1972?

A Yes.

Q Is there any merit to the claims made against you?

MR. MANDEL: Objection.

THE COURT: Sustained.

MR. GRUTMAN: No further questions.

CROSS EXAMINATION

BY MR. BERKOWITZ:

Q Mr. Persky, was any other party, to your knowledge, added in February 1972 as an additional defendant on counterlcaim besides yourself and Finley, Kumble?

A I think Harry Berkowitz was there at that time.

MR. BERKOWITZ: Thank you

MR. ESTERMAN: I have no questions, your Honor.

MR. GRUTMAN: I have one question I omitted.

Q Was there any reason why Mr. Mandel was not present on the night of the closing on February 11th?

A If there was, I have no knowledge of it.

Q Did you exclude him or his clients from attending?

A If he had shown up, he would have been welcome to say.

(Continued on next page.)

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U.S. DISTRICT COURT
FILED
AUG 20 1975
S. D. OF N.Y.

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Persky, you told the jury on Friday something about prior convictions that you have had.

A Yes, sir.

Q And I think you were acquitted in 1973, for the first conviction, is that right?

A That is correct.

Q In this court house?

A Correct.

Q You were sentenced to two years of imprisonment on condition that defendant be confined in a jail --

MR. SHAW: Objection, your Honor.

THE COURT: Yes, I think we are getting into a little more detail than necessary.

MR. MANDEL: I think, your Honor, I am entitled to put in the certified record of this court and to go into what the nature of the offense was and I will remind your Honor that Mr. Persky said what he was convicted for, he said he was convicted for failing to report money somebody else stole, and I have an absolute right, that door being opened, to show what actually happened.

MR. ESTERMAN: I object to this narration by Mr. Mandel.

MR. GRUTMAN: I join in that objection.

MR. SHAW: I object, your Honor.

THE COURT: I will overrule those objections. I think I will overrule the objection, as far as it has gone, under Rule 609(a), since the facts Mr. Mandel wishes to elicit are established by public record. These rules of evidence become force of law, as they have, starting tomorrow morning, is that right?

MR. GRUTMAN: That is right, your Honor.

THE COURT: I will treat them as guidance to me at this point and overrule the objection.

MR. GLATZER: That is not necessarily with cases in progress, your Honor. I think the enactment says --

THE COURT: I will permit it. Go ahead.

BY MR. MANDEL:

Q You were sentenced to two years of imprisonment on condition that defendant be confined in a jail or treatment type institution for four months and the remainder of the sentence of imprisonment is suspended and the defendant is placed on probation for a period of two years, subject to the standing probation order of this Court, and that was your sentence on the first conviction?

A Correct.

Q Is that correct?

MR. MANDEL: I would like to offer this in evidence.

MR. GRUTMAN: Objection, cumulative, repetitive.

THE COURT: Sustained.

Q You said on Friday that you accept the verdict of the jury and what you meant to say --

MR. ESTERMAN: I object, your Honor.

MR. GRUTMAN: He did so testify.

THE COURT: He did, but I don't see that this is appropriate cross examination.

MR. MANDEL: I ask whether that means he admits he was guilty as charged, what does that statement mean?

MR. ESTERMAN: Objection.

THE COURT: Overruled.

Q Does that mean you were guilty as charged?

A Yes.

Q Was this first conviction the one which you said was the conviction where somebody else stole money and you failed to report it and that is why you were convicted?

A Mr. Mandel, both convictions arose from the same indictment. There were four counts in it that applied to me, and for reasons unrelated to me, there were two separate trials, and at the first trial there was an acquittal on one count, a conviction on one count, and the second trial, the same thing happened. Both of the charges of which I was convicted were related to one incident and the incident arose when a Mr. Galanis and a Mr. Yamada stole money from one of my client corporations and both counts related to my failure -- what the jury found me guilty of was not setting forth that theft in an annual report filed with the Securities and Exchange Commission and they also found I had not revealed that in a press release and notice to shareholders, and that was the second count.

MR. MANDEL: I move to strike on the ground that he has not answered my question.

THE COURT: Denied.

Q My question to you is this: Isn't it true that the money that was stolen was stolen from a corporation as to which you were an attorney and officer?

A Yes.

MR. ESTERMAN: I object, your Honor.

THE COURT: Overruled.

Q How much money was stolen?

MR. SHAW: Objecti[illegible]our Honor.

MR. ESTERMAN: Objection.

THE COURT: On what ground?

MR. SHAW: I think that is just calculated to prejudice and is otherwise irrelevant. There is no connection between Mr. Persky and the act involved, so it can't have any bearing upon Mr. Persky.

MR. MANDEL: I am making the connection, your Honor.

THE COURT: No, this is permissible, in my judgment. Overruled.

Q How much money was stolen from Microthermal Corporation -- that is the right corporation?

A Right.

Q How much money was stolen? Just a number, please.

A Originally, $480,000.

Q And that money was used to bail out an investment that you and the president of that company had made, isn't that right?

MR. SHAW: Objection.

THE COURT: Overruled.

A No, that is not correct.

Q Are you familiar with the Court of Appeals' decision --

MR. SHAW: Objection, your Honor. Having brought out the answer -- having asked the question and gotten a negative, Mr. Mandel is foreclosed, otherwise we will try this case and we will have another case within a case.

THE COURT: Come to the side bar, please.

(At the side bar.)

THE COURT: Isn't this admissible under Rule 608? This is specific act, instacne of the conduct of a witness for the purpose of attacking his credibility other than the conviction of crime, since this is probative of truthfulness or untruthfulness and may be inquired into on cross examination.

MR. SHAW: Your Honor, the point I make is this: Having asked the question and having gotten a negative answer, this is a collateral area being brought into issue by Mr. Mandel on cross examination and he should not be permitted to impeach the witness for the purpose of impugning him by going into collateral issues, whether or not the money was used for a purpose or not, and the witness said no and it seems to me we can't go further on that otherwise we will have another trial in this case.

THE COURT: Does this have some bearing -- I don't know what --

MR. MANDEL: This is the Court of Appeals' decision saying the money was used to bail out a private investment.

THE COURT: The problem is, under specific instances of misconduct, which has always been an area of permissible inquiry --

MR. GRUTMAN: If he says no, that is the end of it.

THE COURT: It is not the end of it with him. I think he can be inquired of to see whether he has a different recollection. It is certainly true you cannot contradict him by any other witness, but it seems to me you don't have to accept his first denial if you are in a position to see whether he won't abandon that denial upon further inquiry.

MR.GRUTMAN: Mr. Mandel by brandishing along the jury rail what he calls public records --

MR.MANDEL: That is a public record.

THE COURT: Put your questions from this without making it appear that you have this piece of paper that you are ready to thrust in his face.

MR.GRUTMAN: Try to keep it from the eyes of Juror No. 3.

(In open court.)

BY MR. MANDEL:

Q Mr. Persky, the money that was stolen was put into what company, Takara Partnership, or something like that?

A Takara Partners.

Q At that moment Takara Partners owed you and Mr. Kaplan a substantial sum, about $240,000, is that right?

A That is correct.

Q After Microthermal money was paid to Takara Partners, Takara Partners paid back to you and to Mr. Kaplan the money owed to you, is that correct?

A That is substantially correct, but not totally.

Q How much of that money came back to your personal pocket?

A Actually, none of it.

Q Will you explain that, please?

MR. SHAW: Objection.

THE COURT: Overruled.

MR. SHAW: I withdraw the objection.

A Mr. Mandel, I accept the verdict of the jury that I was guilty of something. I donot accept the facts set forth in the Second Circuit opinion because the government on the trial stipulated in writing, in the bill of particulars and orally, that I did not receive any unlawful compensation and did not steal any money or take any money, and I accept that as the fact, and that statement of the facts which was an excerpt from a six-week trial, a 4,000 page record, happens to be a minor error in the

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Court of Appeals' decision and that is why you and I don't see the same version of the facts.

Q The fact is that the money went to the partnership which owed you a substantial sum, is that correct, right?

A Well, it was really Mr. Solomon's money, whose name you have not mentioned yet, and it went back to him.

Q You mean it wasn't Microthermal money?

A You asked what money was owed to someone. They owed two different people, Microthermal and Mr. Solomon, and I was a participant, as was Mr. Kaplan in the transaction. Mr. Solomon advanced money, he got his money back.

Q In other words, what you are saying, and do I unde[illegible]nd you correctly, is that if the Microthermal money had not gone into -- wrongfully been stolen to give to the Takara Partners, Solomon would have lost his money and you would have owed him a portion of it, is that correct?

A That isn't really correct, either, because Takara Partners had a lot of other money that apparently, although we didn't know it at the time, was manipulated. Takara Partners stole $10 million from various sources, including Kieth Funston, the head of the Stock Exchange, including many other people, and they manipulated the money around.

Q At one point they got you involved?

A Correct.

Q You signed up and were stuck for a large sum of money. How much?

A I wasn't stuck for anything.

Q How much did you sign for?

A I was a participant of one-fourth in the transaction with Mr. Solomon, and after that transaction, there were three other transactions, which are part of the Court record, subsequent to that time which had the same formula.

Q And your transaction, that you were a one-quarter partner, what was the size of your participation?

A Each of the transactions, that one and the next three, was 25 per cent.

Q What was the dollar amounts?

A I advanced no dollars. It was all Mr. Somomon's money.

Q What did you owe, what was your dollar share?

A I didn't owe anything.

MR. GRUTMAN: Your Honor, I fail to see the relevance of any of this on cross examination.

THE COURT: So far, I don't see any.

Q Is it your testimony that you got no personal benefit from the payment of Microthermal's stolen money to Takara Partners?

MR. SHAW: Objection, your Honor. There is no establishment that this is the case.

THE COURT: Overruled.

A It is both my testimony and a stipulation with the United States Government that that is the truth.

Q You know of the stolen money, is that correct?

MR. SHAW: Objection, your Honor.

THE COURT: This is the $480,000?

MR. MANDEL: Yes.

Q You knew that $480,000 of Microthermal's money had been stolen?

A By June of 1970, yes, but not at that time.

Q Thereafter you filed various reports concealing that theft, did you not?

A I sent a covering letter with one annual report, Form 10-K, to the Securities and Exchange Commission, and I omitted in that report to express my opinion -- I didn't prepare that report, but the jury found that I should have at that moment said to the Securities and Exchange Commission that the accountants were wrong, that Galanis and Yamada had taken the money.

Q You knew that the accountants had been bribed into a false report --

MR. SHAW: Objection, your Honor.

MR. ESTERMAN: Objection.

THE COURT: Overruled.

A No. There is also a stipulation in the court record that I did not know of that bribe.

Q You knew that the report that Microthermal had a Franklin National Bank certificate of deposit of $500,000 was untrue?

A Yes. That is what I was convicted of, knowing that.

Q And letting it still show, sending out a report that showed money was still there?

A Yes. I should have indicated it as a claim against Galanis and Yamada.

Q That was a situation in which you had a fiduciary duty as an attorney to the corporation, is that correct?

MR. SHAW: Objection, your Honor.

MR. ESTERMAN: Objection.

THE COURT: Overruled.

A That is correct.

Q And that was a situation in which you a fiduciary duty as an office of that corporation?

MR. SHAW: Objection, your Honor. I submit this is now becoming clearly improper.

THE COURT: No, let's establish that he was an officer, first. There is no foundation for that.

Q Were you an officer of Microthermal?

A I was secretary of the corporation.

Q Were you a director as well?

A No.

Q As secretary of the corporation, you had a fiduciary duty to that corporation and its stockholders, correct?

A Correct.

Q And you deliberately violated that fiduciary duty, did you not?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A No. I violated a duty to file a correct report. I did not violate a duty to the corporation.

Q Was it injurious to the stockholders for you to make that false report?

MR. SHAW: Objection, your Honor.

MR. ESTERMAN: Objection, your Honor.

THE COURT: Overruled.

A I don't know the answer to that. I will tell you the facts. Subsequent to the filing of the report, in the fall, we were able to recoup about $125,000 of that money. If the report had been filed at that time, I don't know whether we would have gotten any of it back.

Q In your opinion, does what you have just said excuse your failure to make an honest report?

MR. SHAW: Objection, your Honor.

THE COURT: Sustained.

Q Your second conviction was that you did unlawfully, wilfully and knowingly in the purchase and sale of securities by the use of the means and instrumentalities and communication in interstate commerce and by use of the mails did employ devices, schemes and artifices to defraud, is that correct?

A That is the statutory language, yes.

Q Is that what you were found guilty of?

A What I was found guilty of were the facts that I told you, and the artifices and devices was an omission in a letter the shareholders and in a press release that that same money we have been talking about had been stolen by Galanis and Yamada.

Q In the second conviction, which came in 1975, by the way, the thrust of the complaint was that other people were buying stock after the theft because of your false report?

MR. SHAW: Objection.

MR. GRUTMAN: Objection, your Honor.

MR. SHAW: The indictment, not the complaint -- the conviction is relevant, the facts are relevant, but not the charge.

THE COURT: I sustain an objection to the form of the question.

MR. GRUTMAN: Will the jury be instructed to disregard the question, your Honor?

THE COURT: Yes.

Q The fact is that on the second conviction you were convicted because the press releases you put out were knowingly false and induced people to buy stock that was not worth what they thought it was worth, true or false?

MR. SHAW: Objection to the form, your Honor.

THE COURT: It is objectionable in form. Sustained.

Q What was the purpose of the press release, Mr. Persky?

A The purpose of the press release was to inform the shareholders of a transaction. It had nothing to do with inducing them to buy or sell stock. The thrust of the government's position was that if there was any purchase or sale at that time, the person buying or selling should have known Galanis and Yamada took the money, and my fault, my guilt was that I should have made sure that press release said that.

Q Why didn't you do what you were supposed to do?

A Same reason that I gave you before.

Q What was that?

A I guess I made a mistake of judgment in terms of what was good for the corporation. I was wrong.

Q You were willing to do something dishonest in order to help the corporation?

MR.SHAW: Objection, your Honor.

THE COURT: Overruled.

A I did not believe it to be dishonest at that time.

MR. MANDEL: Your Honor, I am now offering --

MR.SHAW: Mr. Mandel knows I am going to object to this document.

MR.MANDEL: Yes, but I am making my record --

THE COURT: Why don't you give these instruments a ticket and offer exhibits blank, blank and blank, by letter and number, and I will deem them objected to and I will look at them.

MR. MANDEL: Okay.

THE COURT: Mark these as one exhibit. Have you seen these, Mr. Shaw?

rmbr 1

AFTERNOON SESSION

2:10 p.m.

(In open court; jury prsent.)

MR. SHAW: Your Honor, I might indicate I made available to Mr. Mandel exhibits which I premarked 53 through 118, for his examination.

MR. MANDEL: I have not had a chance to look at them yet, your Honor.

THE COURT: Well, this is not the best time to look, obviously.

Go ahead, sir.

ROBERT PERSKY, resumed.

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Persky, can you fix, with some particularity, the first time you had anything to do with the Newburger, Loeb situation?

A I didn't hear your last word.

Q Situation.

A The best I can do would be the end of August, 1970.

Q You were brought into that situation at that time by whom? Was it Mr. Kayne?

A I personally was brought in by a phonecall from Mr. Underberg to me while I was on vacation, saying he had been consulted by people at Newburger, Loeb, introduced through two former clients of mine, Paul Risher and Bob Muh, and that he thought they would move from real estate areas, with which he was perfectly familiar and competent, into areas of securities law and thought that if possible I should return that week, instead of delaying my return until the very end of August, because at that time in the firm there were not many people in the securities department.

Q It was an important new matter and you came back from vacation, right, in August, youcame back early from your vacation in August because it was important?

A Correct, and --

Q And you had been --

MR. GRUTMAN: Your Honor, may he finish the answer? It becomes garbled and he buries it under so many clauses.

MR. SHAW: We have a "yes" on the record.

MR. MANDEL: I apologize to the world.

Q Risher and Mueh had already been clients of your firm and Kayne was associated with them, is that correct?

A At that moment in time? As I understood the situation then, Newburger, Loeb, the partnership, had hired Risher and Muh and to the extent that Kayne was still then a partner, I guess the word you used, "association" was correct, but he was not a partner of Risher, Muh.

Q Kayne was the person in Newburger, Loeb who brought Risher and Muh into the situation, right?

A That is my understanding, yes.

Q So you came back and you immediately went into consultaions with Kayne and Risher and Muh, is that right?

A And the real estate department, yes.

Q But you did more than go into consultation about the real estate department; Kayne was about to become managing partner or was going to do something as managing partner and he came to you for personal advice as well, is that right?

A My recollection is that he was already managing partner.

Q All right. He was going to hold a meeting and he came to you for personal advice, is that right?

A I am afraid I don't understand the question.

Q Well, maybe we can refresh your recollection --

MR. SHAW: Objection, your Honor.

Q Do you remember that you attended or had something to do with a meeting of the executive committee on August 24, 1970 at which a court reporter was present?

A I don't believe I was at that meeting.

Q Did you prepare a written statement for Kayne to read at that meeting?

A I don't remember doing that.

Q Well, I will now show you --

MR. MANDEL: Please mark this for identification.

Q I am showing you Defendant's Exhibit S for identification --

MR. GRUTMAN: How many pages is that, Mr. Mandel, 32?

MR. MANDEL: That is correct.

Q I ask you if you this refreshes your recollection with regard to your having anytying to do with preparing Kayne for that meeting?

MR.SHAW: The witness is being shown a 32-page document. Couldn't his attention be directed to one of those pages that is supposed to refresh his recollection rather than all 32 pages?

THE COURT: I don't know.

MR. SHAW: It would seem to me thatwould be the only fair way of doing it.

THE COURT: It may be the entire instrument does it. I just don't know.

A It doesn't refresh my recollection.

Q All right.

I will try another way.

MR. GRUTMAN: Your Honor, I am going to ask --

THE COURT: I sustain that objection.

Q Would it refresh your recollection if I say to you didn't Kayne tell you before the August 24th meeting that he was going to tell the Executive Committee that he had claims against all of them or a lot of the partners and he was reserving his rights and he wanted you to prepare legal language for him to read this into the record before a legal stenographer? Do you remember that or do you not?

A I don't remember it.

THE COURT: Mr. Mandel, the record is unclear. This is an Executive Committee meeting of whom?

MR. MANDEL: Newburger, Loeb & Company, on August 24th, 1970.

Q Did there come a time when Kayne or Risher or Muh told you that they had plans to take over the majority interest or purchase the majority interest in the

Newburger, Loeb brokerage business in any way?

A No, they didn't tell me that; that evolved out of a series of meetings with attorneys for the general partners, limited partners and subordinated lenders and my finding Mr. Aixala.

Q My question is this, sir: When was the first time, to the best of your recollection, that either Risher or Kayne or Muh told you or said in your presence that they intended to, one way or another, acquire the Newburger, Loeb business?

MR. SHAW: Objection, your Honor.

THE COURT: On what ground?

MR. SHAW: Because it has not been established that they ever t-ld him that and now he is asking when was the first time he was told that. That is like "When was the first time you beat your wife" type of question.

THE COURT: Do you make a representation, Mr. Mandel, that there is evidence that such a statement was made?

MR. MANDEL: I believe it is true -- no, I wouldn't make the representation, your Honor.

THE COURT: Let's proceed by establishing there was such a conversation.

Q Did there come a time when Risher, Kayne or Muh said in your presence that they were interested in acquiring the Newburger, Loeb business?

A Not in so many words. There came a time in the fall of 1970 where after all of these meetings and the finding of additional capital there evolved a program which seemed feasible for transferring the assets to the corporation and at one point --

THE COURT: Well, no, Mr. Persky, you have answered the question, and the answer is no.

THE WITNESS: Right, your Honor.

THE COURT: All right, go ahead.

Q Did there come a time when you were retained to represent someone who was going to try to acquire a controlling interest in the Newburger, Loeb business?

A Yes.

Q Did that time come?

A I can't fix the moment, but it was, I would guess, November, early December, when it became --

Q I just asked about the time. November or early December. Who did you begin to represent at that time in connection with acquiring the Newburger, Loeb business?

A A group which would be composed of Paul Risher, Fred Kayne, Bob Muh and the floor members, certainly, of

Newburger, Loeb.

Q That became your clients at that moment and you became their lawyer at that moment, is that correct?

A That is correct.

Q Who were the members of Newburger, Loeb that you said you began to represent at that moment?

A Well, to the estent that there had to be floor members, it was always contemplated that the general operating partners who were the New York Stock Exchange floor member and the American Stock Exchange member would be part of the group.

Q Name them, please.

A Dick Stern was the American Stock Exchange member and it was Robert Newburger who was the New York Stock Exchange.

Q And there came a time when Mr. Leonard Berkowitz became a member of that group?

A Not really.

Q Did there come a time when anybody else became a member of that group you were representing?

A By December 31st there had been tentative decisions as to who would be active members in the corporation, and I don't remember exactly which of the partners were going to be active, but not all of them, that is, general partners.

Q Well, that had been decided before December 31, had it not?

A Nothing was sancrosanct in this transaction as to who was in and who was out. There was a point when Mr. Freund and Fred Kayne had words at a meeting and Fred Kayne walked out and said "I am going home. I don't want anything more to do with this' and that happened all the time, people walked out.

Q I am talking to you about what happened -- before December 31st there were other individuals you were representing as part of the group that was going to acquire control of the new entity?

A I thought your question was was it fixed, and my answer was that that didne't remain a fixed group.

Q Would you answer my question, were there other individuals besides Risher, Muh and Kayne and Stern and the Newburger you mentioned?

A Yes.

Q Who else?

A I don't remember exactly which general partners. I think there were two Roggenburgs and one was going to stay and work in the corporation and one wasn't. There were other people and I really don't remember at this point.

Q Did there come a time you learned that Larry Berkowitz had been promised a position in this new team when Kayne asked him to move from California to New York?

A Promise? No.

Q Well, are you quarreling with "promise"? Suppose I say it was indicated to Berkowitz that he would have a position in the new team.

A I never knew of any reason why he shouldn't have continued his position as compliance director.

Q I didn't ask that question at all. I asked --

THE COURT: Please read the question.

(Question read.)

THE COURT: Were you aware of any such indication at any time?

A I was not aware of any such indication and I was trying to say I wasn't aware of any contradiction either.

Q While you were representing the new group in negotiations with various people, were you also representing the partnership as its general counsel?

A Yes, except for the purpose of these negotiations.

Q You were the general counsel of the partnership for every puprose except that for the negotiations of the transfer agreement you were representing the new group and not the partnership, right?

A No, wrong.

Q All right, you tell me.

A Golenbock and Barell continued to handle the problem of the Buffalo Braves. Osmond Frankel continued to handle certain litigation which he was handling. Finley, Kumble assumed the responsibility for certain litigation for tryingto extend the live of the partnership while these negotiations were goingon, and then each of the various components of the partnership, the general partners, limited partners, subordinated lenders each had their group of counsel, the people on that distribution list.

Q That has to do with the negotiations Q-

MR. GRUTMAN: Your Honor, I object to Mr. Mandel interrupting the witness.

THE COURT: I was not aware in this case that that had happened.

MR. SHAW: The question was "Tell us what happened" and then he goes on and he doesn't like the answer and he cuts him off.

THE COURT: Let's go on with the next question.

Q You were acting as general counsel to the partnership while you were also acting as attorney for the group that was seeking to acquire the business, is that correct?

A Well, you are defining the words "general counsel" and I tried to define our areas of responsibility and you can call it what you want, but these were the factual areas.

Q Have you ever defined your role as general counsel?

A To the extent that we have primary responsibility for compliance and litigation, we were general counsel, but it didn't encompass the idea of doing everything, and never did.

Q Can we be clear about this: Everything which you personally did in connection with the Newburger, Loeb situation, sir, you did as a member of the firm of Finley, Kumble and on behalf of that law firm?

A Yes.

Q And it is that law firm which is a defendant here today, an additional defendant along with you, is that correct?

A Thatis correct.

Q and at all times, from the beginning of your participation to theend, you were acting on behalf of that law firm?

A As a partner in the law firm, yes.

Q In your role you also directed certain of your subordinates, particularly Mr. Bamberger?

A That is correct.

Q Did you have an arrangement with the individuals you represented in the new group as to whether they would pay you if the efforts failed and the transfer agreement did not go through?

A Not an explicit agreement, no.

Q Was there an understanding?

A I think there was an unexpressed understanding.

Q And what was that?

A That we would be paid for out-of-pocket disbursements and probably would not get paid for the balance of our fee.

Q During the months of September and October and November and December of 1970 and January of 1971 until February 11th of 1971, how much work did you and your firm do on behalf of the new group?

A I don't know what measure you are looking for.

Q Do you know an hour measure?

A Without looking at records, I couldn't tell you.

Q Did you ever bill anybody for the work that your law firm did in negotiating on behalf of the individuals and in closing the transfer agreement on February 11th?

A Yes.

Q What was the amount of that bill?

MR. SHAW: Objection, your Honor, unless the object of this suit is to pay legal fees. It is totally irrelevant to this case, is prejudicial. Of course the law firm was paid but how is that relevant with respect to the conspiracy?

THE COURT: Yes, come up here, please.

(At the side bar.)

MR. MANDEL: Mr. Persky just testified that if the deal would not get through he would get nothing but disbursements.

MR. GRUTMAN: He didn't say that. He said the remainder of the fee would not be paid.

MR. MANDEL: That is exactly what I said. The size of the fee he collected shows a motive for his desire to have the deal go through and, therefore, it bears on the question of his good faith and his activities in trying to push the deal through. In other words, as I understand the witness' testimony, if the deal failed, he would only get back disbursements and I want to put on record how many thousands of dollars he got when the deal went through.

MR. GRUTMAN: The testimony here is that this is nt a contingent fee, that the fee was paid in part for the services performed.

The only portion of the fee which might not be paid in event the deal failed was that part of the work done to help organize the corporation. For him to put in the suggestion of how much we were paid or what we were paid as an alleged element of a conspiracy is absolutely absurd. He said they would't get paid the corporate services and is this a motive on a partial contingency --

THE COURT: Let me be sure I understand one thing, because I think this is critical. The question here, among other things, is the good faith of Mr. Persky in giving the opinion letter, Exhibit E, on the night of February 11th and Mr. Mandel is endeavoring to prove that if the deal closed, he got a fee which he would not have gotten if the deal had not closed, and if that is the purpose of the offer then obviously it is relevant because there is a monetary factor there and the jury could conclude it was a motive for the opinion letter he gave.

MR. GRUTMAN: What he wants is all the fees --

THE COURT: He is trying to establish how much money it is --

MR.GRUTMAN: There is a difference for what he got paid for services on a non-contingent basis --

MR. SHAW: You can establish he would not have gotten paid if the deal did not go through --

THE COURT: If the figure is $50,000, there is a $50,000 motive to close. The jury could certainly so conclude. The objection is overruled.

(In open court.)

THE COURT: The objection is overruled. You may have an answer.

MR.MANDEL: Could you read the question back?

(Read.)

MR. GRUTMAN: For which service is this?

MR. MANDEL: I will rephrase the question.

Q What was the amount of your law firm's fee for representing the individuals who formed the new group beginning when that started, and working on the transfer agreement through representation of the corporation, through the closing on February 11th?

MR. GRUTMAN: Same objection, your Honor, because part of it may not have been contingent or subject to the condition --

THE COURT: Let's find out what it was.

Overruled.

A Without looking at the copies of the bills, I couldn't tell you.

Q You don't remember?

A No, sir.

Q Was one bill sent for that? Was it put in one bill?

A I don't remember whether it was one or more bills.

Q Will you produce those bills or that bill?

MR. SHAW: Objection, your Honor. No notice or subpoena has been served with respect to this.

THE COURT: Overruled.

Does Mr. Persky have that bill available to him or under his control?

MR.GRUTMAN: He doesn't.

MR. MANDEL: Does Finley, Kumble have it?

MR. GRUTMAN: Finley, Kumble has never been asked to produce it. This is the first notice that I have that Mr. Mandel wants to pry into our underwear. I will make every effort to get the bills, your Honor, if they exist, and I will report to the Court.

THE COURT: Very good.

Q Mr. Persky, to the best of your recollection, was that a substantial bill?

MR. GRUTMAN: Objection.

THE COURT: Sustained.

Q Was it also in your mind that if you succeeded in putting this deal through you wuld have a good client in the Newburger, Loeb Corporation?

A Yes.

Q Did you represent anybody else whom you have not yet mentioned in connection with trying to put through this deal that was the transfer agreement?

A To the extent that Mr. Aixala had representation, I was representing him.

Q You were Aixala's attorney?

A Correct.

Q And you signed the agreement on his behalf on February 11, is thatcorrect?

A Yes.

Q And you continued to represent him since in many situations, is that correct?

A Strike "many"and say "other" and that is correct.

Q By the way, you testified that Mr. Aixala put up a million dollars worth of Bacardi stock? Was that your testimony on direct?

A Yes.

Q He didn't put that stock up right away, did he? He couldn't get the full amount up right away, could he?

A You mean right away, February 11th?

Q Right.

A By February 11th I think it was all available, or within a few days.

Q Isn't it true that your partner, Mr. Greene, lent Mr. Aixala a sum of money in connection with Aixala putting up his share of whatwas to be done under the transfer agreement?

MR. GRUTMAN: Objection.

THE COURT: Overruled. You may answer.

A No.

Q Isn't it true that you also put up some money or lent Mr. Aixala some money or securities so that he could comply with his share --

MR. SHAW: Objection.

Q -- with his obligation under the transfer agreement?

THE COURT:Overruled

A I know what you are talking about, but the answer to your question is no.

Q You mean I am not hitting the nail precisely on the head but I am right in substance?

A No.

MR. GRUTMAN: Objection.

THE COURT: Sustained in form.

What is he talking about, Mr. Persky?

A Mr. Aixala had a loan at a bank in Florida. Some of the Bacardi stock which he agreed to subordinate was collateral for that loan. I was unaware of that until either January or the beginning of February and Mr. Aixala raised the problem that he didn't have ready cash to pay over the loan. I had to find a solution to releasing that stock as collateral. My partner, Mr. Greene, was trustee of a trust that had securities. I proposed a solution, thatthose securities be substituted as collateral for Mr. Aixala's loan, that the trust receive additional payment for the loan of those securities for collateral and that the Bacardi stock be released. In other words, there was a substitution of collateral. The bank agreed to that, the trustee agreed to that, Mr. Aixala agreed to that. The trust felt it was important to get the fee in advance. Mr. Aixala was not in New York, time was of the essence, and I wrote a check to the trust to pay the interest payment or the fee payment to the trust. Mr. Greena sent the stock to the bank, the bank sent the Bacardi stock back to Newburger, Loeb, and a couple of months later, or a couple of weeks later, I don't remember, Mr. Aixala gave me back the interest I advanced.

Q You advanced money personally?

A Out of my own personal checking account.

Q Do you remember the amount of that?

A It was, I think, 1 or $2,000.

Q What was the size of the securities that Mr. Green had the trust transfer to the Florida bank to release Aixala stock?

A I don't remember.

Q Some hundreds of thousands of dollars?

A It was in excess of a hundred, but I don't remember how much.

Q You told Mr. Aixala, did you not, that there would be minimal risk with regard to his participation in this Newburger, Loeb situation?

A I think my statement to him was that within a risky situation, it was a minimal risk.

Q Did there come a time when you forwarded to Mr. Aixala for his signature an affidavit to be used in this court saying that his money was at substantial risk?

MR. SHAW: Objection. Facts occurring subsequent to the filing of the complaint, your Honor, not referred to in the complaint --

MR. MANDEL: They are still probative of bad faith. There is clear law that admissions, the commission of perjury --

MR. GRUTMAN: Your Honor, please, this is so improper --

THE COURT: All right, let me just think about this for a minute.

Ladies and gentlemen, as I cautioned you before, nothing that counsel says is evidence in any way and is to be utterly disregarded by you. Only answers to questions are evidence.

Let me see the affidavit you are talking about.

MR.MANDEL:Yes, your Honor.

(Pause.)

MR. MANDEL: In his deposition he said something entirely different, your Honor.

THE COURT: Let me see that as well.

MR. MANDEL: May we have the Aixala deposition, please.

(Pause.)

THE COURT: Gentlemen, come to the siee bar, please.

(At the side bar.)

THE COURT: I think it appropriate to get some ground rules here, because it would seem from what I have been shown a certain amount of examination is appropriate.

Mr. Mandel, you have shown me Exhibit T for identification, and specifically paragraph 5?

MR. MANDEL: Right.

THE COURT: You have shown me Mr. Aixala's deposition, pages 95 and 96. There would seem to be there a clear statement by Mr. Aixala that his statement in Exhibit T, that Mr. Persky told him this had substantial risk aspects, he completely disavows. Now, how do you propose to utilize this?

MR. MANDEL: I propose to ask this witness if he forwarded the affidavit to Aixala to sign, which in an answer to interrogatories he said he has done -- whether he forwarded it to Aixala to sign. Then I propse to ask him if his understanding of this statement is true.

MR. GRUTMAN: That affidavit is not evidence.

THE COURT: It seems to me an essential element may be missing.

Who prepared this affidavit?

MR. MANDEL: Herbert Roth but this witness forwarded it.

MR. SHAW: I have no objectionto Mr. Mandel showing this witness any document trying to refresh his recollection, et cetera, but where in the middle of a lawsuit we try the issue of whether false affidavits were prepared, after the filing of the compalint, and it seems to me this is totally extraneous and erroneous --

THE COURT: The issue is squarely raised as to this witness' good faith in the preparation of the letter, Exhibit E. I am not saying this is so for not so, but I got the suggestion -- I mean, I drew the conclusion from looking at these documents -- you are aware Mr. Persky sent on Exhibit T -- that somehow it may have come to his attention that this statement in here was not true and if that is true, the jury could consider that on the question of the good faith as to Exhibit E and the general credibility of this witness.

MR. GRUTMAN: But you can't cross examine a witness by using apparent inconsistencies and contradictions in another witness' statement --

THE COURT: I am asking if this witness had an awareness of that statement --

MR. GRUTMAN: He has an obligation to forward the affidavit --

THE COURT: That is why I asked before what his connection was with the preparation. I think if his present understanding is that he doesn't either recall what is in there or in some other way --

MR. GRUTMAN: Then that is the end of it.

THE COURT: All right.

MR. GRUTMAN: Right.

(In open court.)

BY MR. MANDEL:

Q I ask you to examine Exhibit T for identification, Mr. Persky, and to state whether you forwarded that to Mr. Aixala in Florida for his signature and notarization?

A Yes, this is the afidavit that I forwarded.

Q Did you read it before you forwarded it to him?

A I don't remember whether I read it or not. It was given to me by Mr. Roth, who asked me to forward it, since I had the closest relationship with Mr. Aixala.

Q And you don't remember whether you read it or not?

A No.

Q Did Mr. Roth tell you he had prepared it?

MR. GRUTMAN: Objection.

MR. SHAW: Objection. It would be hearsay, your Honor.

MR. MANDEL: No, it is an admission of a partner to a partner.

THE COURT: Well, let us take the statement, yes or no.

THE WITNESS: Yes.

MR. MANDEL: I offer it in evidence.

MR. GRUTMAN: Objection.

THE COURT: Sustained.

MR. MANDEL: May I reoffer this subsequently, your Honor?

THE COURT: If a different foundation is established, I will reconsider it.

Q Mr. Persky, youwere talking this morning about the general shape and meaning of the transfer agreement and the consents of the various parties that were necessary in order to put the transfer agreement into effect, is that correct?

A Yes, sir.

Q And the rights of the parties before the transfer agreement were governed by the partnership agreement of Newburger, Loeb & Company?

A Not all of the rights.

Q The rights of the partners and the limited partners, at any rate, were governed by the partnership agreement and the law, is that correct?

A That is partially correct. Some of them were in a position to negotiate other rights because they were not bound by certain provisions or certain laws.

Q Did you familiarize yourself with the partnership agrement of Newburger, Loeb & Company in connection with your work on the transfer agreement?

A Yes.

MR. GRUTMAN: May I see the one you are going to show him?

MR. MANDEL: Yes (handing).

MR. GRUTMAN: Thank you very much.

MR. SHAW: No objection, your Honor.

Q I ask you to look at Defendant's Exhibit U for identification and state whether that is the partnership agreement of Newburger, Loeb and Company that was in effect during the period from your first connection with Newburger, Loeb, in August of 1970, until February 11, 1971?

A Yes.

MR. MANDEL: Offer it in evidence.

MR. GRUTMAN: May we see it, please, again?

MR. MANDEL: Yes (handing).

MR.SHAW: Your Honor, while this is being examined I might note there is a second partnership agreement,which was filed with the County Clerk which contains some of these provisions and then other providions are not contained.

MR. GRUTMAN: This is not a captious objection, your Honor, but by comparing the copy I havewith the one Mr. Mandel offered, there are differences and I will not consent to this document being received.

THE COURT: The witness has identified it.

MR. GRUTMAN: May I have a voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. GRUTMAN:

Q Mr. Mandel showed you this document, Exhibit U for identification, and you said that it appeared to you to be the partnership agreement which was extant during the period of time you were acting in what he has called the Newburger, Loeb situation. Now, before you answered his questio question, did you read over each and ever page of Exhibit U?

A No. I looked to see if Mr. Kayne was listed as a partner, because I knew he had come in in the early part of 1970 and I reaoned if it was an earlier version, he wouldn't be there. That was my point of identification.

THE COURT: And you find Mr. Kayne's name in this version?

THE WITNESS: Yes.

Q Do you know whether there was one or more than one copy of a partnership agreement that was extant during the period of time you had anything to do with Newburger, Loeb?

MR. MANDEL: I object to that, your Honor.

THE COURT: You mean two different agreements?

MR. GRUTMAN: Yes, your Honor.

MR.MANDEL: Where is the other one?

MR. GRUTMAN:One is filed with the County Clerk and that doesn't look like the one.

MR.MANDEL: I have something which I have offered in evidence.

MR. GRUTMAN: And I have something different from the one you offeRED.

THE COURT: Mr. Persky having identified this one as the one he worked with, because it has Mr. Kayne's name in it -- is that correct?

A Yes, your Honor.

THE COURT: Very good. I will admit it in evidence.

(Defendants' Exhibit U for identification was received in evidence.)

THE COURT: Mr. Mandel, the exhibit is received so you may continue to inquire.

MR. MANDEL: All right, your Honor.

BY MR. MANDEL:

Q You testified this morning, Mr. Persky, about rights of various parties under the agreement, at least as to your opinion of themm is that correct?

A Yes.

Q And you were talking about Exhibit U?

A Yes.

Q And you made yourself very familiar with the various provisions of it, is that correct?

A Yes.

Q And you made some very important decisions based on the provisions of Exhibit U, did you not?

A Yes.

Q And you signed opinion letters based on that exhibit, didyou not?

A I think one opinion letter.

Q and you negotiated what different parties should get or not get based on Exhibit U, is that correct?

A I would say that the lawyers representing the individual partners negotiated what they should get and not get basedon that exhibit. I used it as a basic frame of reference.

Q Is it fair for me to say that the way these negotiations worked is that there were different individuals and fifferent groups who had different interests? Is that right, so far?

A Yes.

Q And in the negotiations, different people said "If I don't get this" or "I don't get that, I won't go along and there will be no deal," is that correct?

A That is substantially correct.

Q And some of the people, general partners and limited partners and withdraw general partners, were being asked to give up rights they had under Exhibit U, is that correct?

A Give up or change, yes.

Q They were asked to give up the rights they had under Exhibit U and they were asked to take something different?

A Yes.

Q Under the transfer agreement, is that correct?

A Yes.

Q And with regard to your particular clients, and I refer now to Risher and Muh and the corporation, your client had no rights -- those clients had no rights under Exhibit U?

A Well, Kayne did, because he was a withdraw general partner, but the others did not.

Q I deliberately omitted Kayne from my question.

A I didn't catch that.

Q But the corporation, Risher, Muh, Berkowitz, Aixala, they had no rights and no standing under Exhibit U?

MR. BERKOWITZ: Objection, your Honor. He has already testified he didn't represent Berkowitz.

THE COURT: Overruled.

A Yes, except, you know, the corporation was not in existence prior to December 30th.

Q Well, the deal was being negotiated for the corporation before it came into existence, right?

A Right, but there was no legal entity at that point.

Q After December 30th there actually was a corporation and you were representing it until February 11th, at least?

A Right.

Q And it had no rights under the partnership agreement, Mr. Persky?

A That is correct.

Q The people who did have rights under the partnership agreement included people you have called general partners and limited partners, right?

A Correct.

Q Did subordinated lenders have rights under the partnership agreement?

A They really got their rights in their subordination agreements.

Q And they were being asked to change those rights and take something different?

A Correct.

Q And Mr. Bialkin was representing them, is that correct?

A There were several attorneys representing them and he was one of them.

Q At different times they said "If we don't get what we want, we won't make any deal and we will put your partnership into bankruptcy," is that right?

A No.

Q Did Mr.Bialkin walk out once?

A Yes, but you are asking whether he said that. What he said is "I am not going to recommend to my clients to go alongwith the transaction if certain things are not done."

I don't think he ever used the word "bankruptcy" or threatened to put the partnership in bankruptcy.

Q Wasn't the implication that you testified to this morning that if a deal wasn't made, didn't you say bankruptcy had to follow?

A Yes, but I anticipated that that was going to be a voluntary bankruptcy, along with bankruptcy of the partnership. There was something Mr. Freund raised the first time I met him. He thought it was inevitable.

Q At any rate, Bialkin's position or the position of the subordinated lenders was that if they didn't get something satisfactory, they would not make a deal, and there were people representing the limited partners, were there not?

A Yes, sir.

Q And they were saying, "If we don't get something satisfactory, we won't make a deal, we don't give up our rights unde this agreement and we won't go along with the transfer arrangement," is that right?

A That is correct.

Q And ultimately they got something satisfactory to them, right?

A Basically, yes.

Q And there were general partners who said, "If we don't get what we want, we won't make any deal and we won't sell the business to your clients, Mr. Persky," isn't that right?

A Their attorneys said that, yes.

Q And the partners said it themselves, isn't that right?

A Mostly through their attorneys.

Q And some of those general partners said, "We owe a lot of money and in order for us to make this deal we are going to insist that some of the money that we owe be released"? Isn't that what they said, in substance and effect?

A Not even in substance. What it was posted as was a fairness problem. The attorneys for the general partners who had the tax refunds coming and were in deficit were negotiating at that point with the subordinated lenders and the limited partners' attorneys and they were saying to the "We realize the more money in the on-going entity, the better, but in fairness we want these people to have a chance in life to have some money in their pocket when this is over with and we want you to agree to permit them not to give up everything."

Q Is it your testimony that this was done as a benign act on somebody's part and without a demand, a bargaining negotiation on the part of the partners who got forgiveness?

A There was hard bargaining all the way through, as you characterized it. If you are asking me what my impression was, there was a great deal of sympathy in the room among the attorneys for the general partners who seemed to be wiped out by this transaction and they wanted to avoid bankruptcy and they had some loyalty to the name Newburger, Loeb and there was emotion in the room as well as hard bargaining.

Q I am asking you whether the attorneys for any of the general partners in deficit said, in substance or effect, "Unless we got forgiveness of indebtedness, unless we get releases from the limited partners and unless we get releases from the other general partners we are not going to make this deal"? Did they sayd that, in substance and effect, or not?

A The second part, on releases, yes, substance and effect. Their request not to give up all the tax refund was much more mildly put and much more mildly accepted than the issue on the releases.

Q Well, Mr. Persky, you know, do you not, that under the transfer agreement a group of general partners got releasesunder the Peat, Marwick figures of December 31, 1970 of half a million dollars or so. Do you know that or not?

A I know there were releases. I don't remember the exact figure.

Q Do you know that it was about a half million dollars?

A I don't know the number. I didn't add it up.

Q At no time?

A No.

Q You didn't add it up where the deal was made and you have not done it to this day?

A No.

Q You wanted Charles Gross to give up something, too, didn't you, to go along with the transfer agreement?

A Yes.

Q You wanted him to give up the right to get a substantial amount of cash which was owed to him?

A It was not due at that moment, but essentially what we wanted him to do was to accept what the other general partners in good capital were taking.

MR. MANDEL: I move to strike.

THE COURT: Strike it out.

Q Will you please answer my question? Do you remember my question or shall I repeat it?

THE COURT: Put it again, please.

Q You wanted Charles Gross to give up the right to get a very substantial sum of money that we owed to him by the partnership and by the partners?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A I can't answer that yes or no.

Q Well, let's see what kind of answer you can give.

MR. GRUTMAN: That I think is really objectionable.

THE COURT: I think given his answer, let's hear how he does want to answer it. Overruled. How do you want to answer it?

A There was a substantial dispute as to how much money was due. What we wanted to accomplish, we wanted Mr. Gross, for whatever the figure was, to accept the type of securities that other general partners who were simply situated were going to get in the transaction.

Q Let's see if I can refresh your recollection. I am showing you Defendants' Exhibit V for identification, which consists of a covering letter and four pages, and ask you if you ever saw it before.

A Yes.

Q What is the date of that document?

A December 17, 1970.

Q Was that sent to the New York Stock Exchange by the partnership?

A I was told it was.

Q Did you have that document in your file?

A I don't know whether I had a copy. I saw it at about the time it was supposedly sent.

Q Did you work on it yourself?

MR. MANDEL: I offer it in evidence.

MR. SHAW: Objection, your Honor.

MR. GRUTMAN: I join in the objection, your Honor.

MR. SHAW: There are a number of reasons not objections --

THE COURT: Let me see it, please.

(Pause.)

THE COURT: What is your objection?

MR. SHAW: It has not been established that the witness has prepared this or had anything to do with it. In other words, the foundation has not been set. Even more important, your Honor, this is only one of a series of plans. This was subsequently substituted by what actually was done. This is just a preliminary plan.

THE COURT: Is there any question as to the authenticity of this exhibit?

MR. SHAW: That is a letter sent to the New York Stock Exchange, no question about that.

THE COURT: Signed by Robert L. Newburger.

MR. SHAW: No question about that.

THE COURT: What is the anticipated use of this exhibit, Mr. Mandel?

MR. MANDEL: This witness has been --

THE COURT: Do you expect to question him about the exhibit?

MR. MANDEL: Yes.

MR. GRUTMAN: I object to that, your Honor.

MR.MANDEL: If the exhibit is in evidence it may refresh his recollection as to facts and what he wanted --

THE COURT: You can do that without it being in evidence.

MR. MANDEL: I think I have a right to put it in evidence.

MR. GRUTMAN: My objection is that the prejudicial effect -- because there are differences within that provisional draft and what was done, the prejudicial harm of admitting outweighs the usefulness it might have and I don't think it should be admitted. If he is serious about saying he wants to show it to refresh his recollection, it could be drawn to the witness but I think he has other purposes and I urge it not be admitted.

THE COURT: I don't see how it can probably be prejudicial.

MR. GRUTMAN: Insofar as the facts don't mesh with what ultimately tranpsired on February 11th.

THE COURT: Obviously it was hard negotiating. Go along here for a bit and see --

MR. MANDEL: May I have it in evidence, your Honor?

THE COURT: Not at that point.

MR. MANDEL: They don't deny the authenticity, your Honor, and we have not been playing that game --

MR. GRUTMAN: Your Honor, there is a reference to Mr. Gross' alleged capital account --

MR.MANDEL: Signed by the president of Newburger, Loeb.

MR. GRUTMAN: The date of the document is December 17th, your Honor, which is two weeks before Peat, Marwick produced a certified copy with Mr. Gross' capital account being half of what is on that document and that is one of the prejudicial elements I say outweighs any limited legitimate usefulness the document might have. It is an utterly uncertified document.

MR. MANDEL: Your Honor, this is an admission by Newburger, Loeb --

MR. GRUTMAN: Not binding on Finley, Kumble.

MR. MANDEL: It is a paper signed --

THE COURT: We are dealing now with the examination of Mr. Persky.

MR. MANDEL: These numbers were used in the negotiations.

THE COURT: The numbers on that last sheet?

MR. MANDEL: Yes.

MR. GRUTMAN: They were not, because the testimony --

THE COURT: No, no, no, please. Mr. Persky was there, and you were not, I assume.

As far as I know, you were not at these negotiations.

MR. GRUTMAN: No, I wasn't, Judge.

Q Would the numbers which appear on the last page of Defendants' Exhibit V for identification used at any time in the negotiations?

A I don't know whether these specific numbers were, because every one had their own set of numbers as to what they thought they owed or didn't owe, whether they were in positive balance or not positive balance.

I can't say these numbers were not used, but I have no distinct recollection that these were used.

Q Do you have any recollection at all as to anything anybody said during any of these negotiations as to how much money was owed to Charles Gross?

MR. SHAW: Objection, your Honor.

THE COURT:No, overruled.

A Yes.

Q All right, what date does your recollection go to?

A I don't know the date, but at two meetings with you.

Q What was said at those meetings and by whom?

MR. SHAW: Objection, your Honor.

THE COURT:No, overruled.

A You were claiming a number which is even higher than the number here.

Q What number was I claimong on behalf of Mr. Gross?

MR. SHAW: Objection, your Honor. How is that relevant, what people are claiming they are entitled to?

THE COURT: Where did we start from with this line of inquiry?

MR. MANDEL: With the negotiations that he went into on direct, and I said what were they asking Gross to give up.

THE COURT: Overruled.

A I sort of recollect something between 3 and $400,000. 369 sticks in my mind.

Q 369,000. When do you say that number was mentioned?

A In two meetings with you, between December 31st and February 11th.

Q The first meeting in my office on January 15th?

A If you say that is what it is, I will accept that.

Q We will see in a minute. At that meeting who was with you on behalf -- whom were you representing and who accompanied you?

A Paul Risher accompanied me and I don't remember whether anybody else was with me.

Q Was Muh there, at my office?

A I don't remember.

Q Wnat number did Risher say was owed to Gross?

A It was substantially lowe, but I don't remember his number.

Q Substantially lower than 369,000?

A There was a great diversity between the sides.

Q All right. To be clear about this, you were asking Gross to give up the right to receive whatever amount was actually owed to him and youwere asking him to take some paper of the new corporation, is that right?

MR. SHAW: Objection, your Honor. We have gone from the point where it has been established that claims were made to the question as if the money was due and that is improper.

THE COURT: We are still exploring the area of what Mr. Gross was being asked to give up, as I understand it.

MR. MANDEL: Right.

Q Is that right?

A Mr. Gross, as you put it, was being asked to give up what he was saying was a cash claim and take some securities as of that moment in an unspecified or agreed upon amount and, in addition, I was there in effect with the authorization of the general partners, limited partners, subordinated lenders saying they were willing to give up the claims which they thought they had against Mr. Gross. So he was to get two things.

MR. MANDEL: I move to strike the second half.

MR. SHAW: Objection, your Honor.

THE COURT: Yes. Strike it out.

MR. SHAW: I don't understand that, your Honor. The question was what was Mr. Gross going to receive.

THE COURT: No, asked to give up.

MR. MANDEL: What was he going to give up was the question.

Q Mr. Gross was not a general partner at that moment, was he?

A That is correct.

Q He was a withdrawn partner?

A That is correct.

Q And as a withdrawn partner he had a special status under the partnership agreement, Exhibit U?

A Correct.

MR. GRUTMAN: I object to special status. He had a status provided for.

THE COURT: Well, the witness says yes. So he understands the question. Overruled.

Q And that status was different from that of the general partners, is that correct?

A Yes.

Q And especially it was different from that of the general partners in the event of a liquidation of the business, is that correct?

A Practically, no.

Q Under Exhibit U, was there a large difference between the rights of a withdrawn general partner and an existing general partner in distribution?

A Under the language, yes; under the practical effect,no.

Q Practical effect is your opinion, is it not?

A Well, so is the legal effect.

Q I am asking you about the legal effect and not the practical one.

THE COURT: His answer is yes, under the legal effect.

Q Will you please describe what the difference was between the rights of a withdrawn general partner and a general partner in liquidation?

A Well, a withdrawn general partner, as I recollect the partnership now, was either, depending on which sentence you read, to be treated as a limited partner or a subordinated lender, and therefore, in order of priority, in liquidation, as between him and the general partners who remained, he had a superior position, but he still was inferior to the subordinated lenders who became subordinated lenders when he was a partner.

So the practical effect was that the legal language didn't make much difference unless there was a lot of money to go around.

MR. MANDEL: I move to strike that, your Honor.

THE COURT: I will let it stand.

Q Under the partnership agreement, a withdrawn partner got paid ahead of limited partners also, did he not?

A I really don't know. There is conflicting language, and I didn't draft that.

Q Were you familiar with the liquidation clause?

A And the treatment clause, too.

MR. MANDEL: Can you give him a copy --

MR. GRUTMAN: No, because it is the only one we have, and we like to track you.

Q Are you familiar with Paragraph 9.2 of Exhibit U? Do you remember that?

A I don't have the foggiest idea of what 9.2 is.

MR. MANDEL: I will read it to the jury.

THE COURT: No, let's not do that.
How long is it?

MR. GRUTMAN: 44 pages.

THE COURT: 9.2?

MR. MANDEL: It is about a page.

THE COURT: How does it advantage you to read it to the jury?

MR. MANDEL: I want to establish the order of priorities --

THE COURT: Let him look over your shoulder.

Q Is is true that under Paragraph 9.2 of the partnership agreement the debts on liabilities other than to partners, that is, general creditors, must first be paid or provided for?

A Correct.

Q And then there must be paid indebtedness owing to partners other than for capital contributions and interest?

A Correct.

Q And then the third order of priority is in payment of the partnership interest of any withdrawn deceased or adjudicated partner still as the risk of the business, right?

A Yes.

Q And that meant Mr. Gross, right?

A I don't know that it meant Mr. Gross because there is conflicting language back in another section.

Q C, after that in payment of the capital of the limited partners, is that right?

A Right.

Q And then, in payment of salaries for general partners, and, finally, in payment of capital of general partners?

A Correct.

THE COURT: Is this a good time to take a recess?

MR. MANDEL: Yes, your Honor.

(Recess.)

Q Mr. Persky, can we establish definitely that your first meeting with me was in my office on January 15th and that Risher and Muh were with you, and in that connection I will refresh your recollection with an affidavit you made at one time.

(Handing).

MR. GRUTMAN: What page is that?

THE WITNESS: 13.

(Continued on next page.)

A Yes, that wouldrefresh my recollection.

Q So you now confirm that our first meeting was on January 15, 1971, in my office, and you had Risher and Muh with you?

A Yes.

Q Do you recall that? I show you Defendants' Exhibit W for identification and ask youif you know what that is.

A It looks like my notes at that meeting.

MR. MANDEL: I offer it in evidence.

MR. GRUTMAN: May I see it, please?

MR. MANDEL: Yes.

(Handing.)

(Pause.)

MR.SHAW: No objection.

MR.GLATZER: No objection.

THE COURT: Received.

(Defendants' Exhibit W for identification was received in evidence.)

Q Do your notes refresh your recollection that at that meeting I told you that we thought Mr. Gross was owed about $300,000 by the partnership?

A That is a number I have written here and I would guess that is right.

Q You knew, did you not, that the reason some partners were in deficit and Gross had what you called good capital of a significant amount, was that Gross had put into the partnership more than his required capital, is that right?

A Correct.

Q You testified on direct that there was a certain amount of required capital under the partnership agreement for each partner depending on his percentage of interest, is that right?

A The statement is right. I don't remember that I testified to that.

Q You testified that there was additional capital and that is why some partners had good capital left over. Do you happen to remember that Gross' required capital was about $412,000, under the partnership agreement?

A I don't remember his number.

Q Will you accept that or do you want to look at the agreement?

MR. GRUTMAN: Which agreement?

MR. MANDEL: The one that is in evidence, Mr. Grutman. There is no other agreement.

MR. GRUTMAN: I object to these questions because they proceed on the assumption they relate to what

Mr. Gross' so-called additional capital was.

THE COURT: Let's show it to the witness.

Q I show you page 5 of Exhibit U and ask you to read out the amount of Mr. Gross' required capital.

MR. GRUTMAN: I can't see the witness, Mr. Mandel.

A The number set forth --

MR. MANDEL: Whatever you say, sir.

A The numberset forth next to Mr. Gross' name is $412,500.

Q You understand that agreement? What does that mean?

A That is the committed capital.

Q All right.

Do you happen to recall that in fact Mr. Gross started out the year with more than twice that amount?

MR. SHAW: Objection, your Honor. The testimony is that the witness wasn't even there then.

THE COURT: Overruled. Either he does or doesn't recall.

A I know he had more than committed capital. I don't remember the amount.

Q And you never knew?

A I don't remember now. I may have known at that time.

There is no number that sticks in my mind now.

Q Do you remember they said to you on January 15th that we were not interested in a deal where partners who owed money were forgiven their debt, whereas Mr. Gross, to whom money was owed, would have to take paper of a company run by Risher, Muh and Kayne?

MR.SHAW: Objection, your Honor.

THE COURT: Overruled.

Q Do you remember.

A My notes show that I wrote down part of what you have just said and not part of what you said.

THE COURT: What is your best recollection, Mr. Persky?

THE WITNESS: My best recollection is what I have written here. It says "Wants some cash, not paper of corporation, but personal guarantees" and then there is a number of $300,000 next to that, and there are some other notes, but I don't think that relates to this sentence.

Q Will you read the other notes?

A Let's start from the top. I wrote "Mandel. Doesn't want to talk."

The next word is "orderly" and my recollection is that meant orderly liquidation. Then I wrote "Present plan and liquidation" which again refers to your request that you don't want the original plan, you want liquidation.

Then there is "Wants some cash, not paper of corporation, but personal guarantee" and the number is $300,000.

Then it says "Gross" I guess that means he said something, "has to be in business. Other partners especially on on-going," meaning ones continuing with the firm,"owe money individually" and then to the left of that it says "Minimal wait to counterclaims" and then it says "5 or 10 percent" and I have no idea of what I meant by that.

Then I wrote "Invitation open for Gross and" something "to call."

Q Having refreshed your recollection to that extent, do you remember that I told you at that meeting that a plan where people who owe money get forgiven the money, whereas somebody to whom a large sum is owed has to give it up, is inequitable and unacceptable? Do you remember that?

A No.

Q Do you remember that I said to you this was especially true since in the event of a liquidation, Gross, as a withdrawn partner, would be paid out of the assets of the firm before even the limited partners? Do you remember that?

A I remember us talking about what Mr. Gross might get and you and I were completely at odds as to what would really happen.

Q You said Gross would get nothing in a liquidation?

A Correct.

Q And I said Gross knew more about the business than you did and he was entitled to make up his own mind about what was good for him? Do you recall that?

MR. GRUTMAN: Your Honor, Mr. Mandel is injecting himself into this case far more than he should.

THE COURT: I was toying with the idea that he should refer to himself in the third person, but nobody objected and everybody appreciates the problem.

MR. GRUTMAN: Yes, and I ask some attention be given to that problem.

MR. MANDEL: There is no problem unless I testify, your Honor, and asking questions is not testifying. Whether I say "Mr. Mandel" or "I," the witness is free to say yes or no and under the rules I will not be able to take my oath and contradict him and there is no merit to this objection.

THE COURT: Well, you are going to get your questions answered, there is no question about that.

MR. MANDEL: Do you want me to say "Mr. Mandel?"

MR. GRUTMAN: Mr. Mandel's averred reticence about taking an oath and testifying is something he may have to do.

THE COURT: In any event, we will have an answer to this question and Mr. Mandel henceforth refer to yourself in the hird person.

Please read the question.

(Question read.)

A I don't remember that language.

Q Do you remember that in substance?

A In substance, I only remember us talking about whether or not in fact on liquidation there would be dollars left and whether or not the counterclaims had any validity.

Q Don't you remember that I refused to discuss with you the balance sheet?

A I remember you started the meeting, and I wrote it down, "Doesn't want to talk." You really wanted to terminte the meeting right away.

Q Do you remember that Gross said he needed some cash because he had to be in business?

A Yes. That is one of the notes I wrote here:
"Gross has to be in business."

Q And he needed the cash so he could go back to his business of being a stock trader, right? That is what he said?

A I don't remember if he identified the business, but I remember that statement.

Q And he said he was willing to make some accommodations, he would take some cash and some other things if they were personally guaranteed by the people who owed him money any way? Do you remember that?

A I wrote down here "Wants some cash" --

Q No, I am asking what you remember.

A I remember if my memory is refreshed by this note.

Q So you do remember that?

A Yes.

Q Do you remember that both Gross and I -- both Gross --

MR. SHAW: Objection.

Q Do you remember both Mr. Gross and Mr. Mandel said to you that they were the judges of what kind of deal would be good for Mr. Gross and not you or Mr. Risher or Mr. Muh. Do you recall that?

A I don't remember that explicitly, but I guess in any negotiation every attorney is saying to the opposition "I think I know what is best for my client." That is the way negotiations are conducted.

Q Do you remember Mr. Gross saying he didn't want to entrust his capital to a bunch of Johnny-come-latelys who were coming in without any significant investment to play around with other people's money? Do you remember that in substance or effect?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A No.

Q Do you remember that you then started to talk about all the things that could be done to Mr. Gross and all the claims against him?

A I remember talking about the second category you just mentioned, that is, all the claims that the general partner, subordinated lenders, limited partners and the partnership itself had against Mr. Gross. We did talk about that.

Q And you made quite a speech about that, didn't you?

MR. SHAW: Objection, your Honor.

THE COURT: Sustained as to form.

Q You said if Gross didn't go along with this deal, there were a lot of lawsuits that would be brought against him?

A I told you that I believed it was in the best interests to avoid litigation and that Mr. Gross should not think these were idle threats made by people, that they were backed by substance.

Q And you were talking about the Buckley claim, right?

A Among other things.

Q You stressed the Buckley claim, did you not?

A The Buckley claim was stressed because it did not arise out of his relationship with his other partners.

It was one it seemed to me identifiable without the emotional attachment the partners had with the acts of Charley Gross.

Q The Buckley claim was very fresh in your mind on January 15th, was it not?

A Correct.

Q It is something that you had created within the past 30 days, right?

MR. GRUTMAN:Objection.

MR. ESTERMAN: Objection.

THE COURT: Sustained as to form.

Q Before you came into the picture nobody had ever asserted a claim against Charles Gross with regard to the Buckley situation? True or false?

A False.

Q Who had asserted a claim against Charles Gross?

A In writing, Webster, Sheffield, Mr. Buckley's attorneys had recited a claim which although directed at Newburger, Loeb named Gross and Company.

Q Was Charles Gross' name mentioned?

A Gross and Company was.

Q Was Charles Gross' name mentioned?

A I don't believe individually, no.

Q Was Charles Gross sued by anybody before you came into the picture? No.

A In connection with Buckley?

Q Yes.

A That is correct,no.

Q Was Gross and Company sued by anybody in connection with Buckley before you came into the picture?

A There should have been a cross claim, but there wasn't.

MR. MANDEL: I move to strike the answer.

THE COURT: Strike it out. I take it the answer is no.

A No.

Q On January 15th, having done whatever you did in December, you started saying to Gross and to Mr. Mandel "If Gross doesn't go along with this transfer agreement, he is going to be called to account on the Buckley claim," is that right?

A Among other things, yes.

Q And Mr. Mandel said to you then that that was nonsense, right?

A Mr. Mandel did not take seriously any of the claims.

Q You testified that Gross wanted to be treated differently from other people, is that right?

A Correct.

Q He wanted to be treated differently from the partners who were in deficit, didn't he?

A Correct.

Q And he wanted to be treated differently from the limited partners whom he contended he would precede in the liquidation?

A Yes.

Q And he had an absolute right to want to be treated differently from them, didn't he?

A He had an absolute right to want anything he wanted, but he was wrong.

Q Wrong in what sense?

A As a general partner who withdrew, he still was liable to limited partners and subordinated lenders in the event there wasn't enough cash for them because they could look to him as a general partner, even though he had withdrawn, to reimburse them.

Q That is what you said then?

A Yes.

Q And that was your opinion then?

A And today.

Q And did somebody deny it and say you are dead wrong and you don't know what you are talking about, in effect?

A Well, you, Mr. Mandel --

Q You are allowed to call me "you" --

THE COURT: He can answer any way that is comfortable here. The jury understands the picture.

A Your approach to this discussion, because I don't think it really got to a negotiation, was that everything that I said or Mr. Risher said was incorrect.

Q By the way, on direct examination you said the subordinated lenders were paid in full. The limited partners didn't get a penny, did they?

A I think they got interest on their loans. I am not sure how much.

Q For a couple of years. But they lose every penny, so that if Gross had taken --

MR. SHAW: I don't think there was an answer to the question.

A I don't know that that has been finally determined.

Q You don't know Newburger, Loeb is in the bankruptcy court now, do you know that?

A Yes.

Q And as far as you know, no limited partner ever got a penny?

MR. SHAW: Objection. He answered they got some money.

Q Some interest. All right.

Let's come back to January 15th. The way it was left was that Gross sadi "I don't like your plans and I don't like your ideas of what's fair" and you said, "Well, we have other ways of dealing with you," in effect, and you walked out and said "Call me if you change your mind." Is that about accurate?

A No. I believe the way we left off was that you stated unequivocally that you thought there was no merit to the claims of the partners or the limited partners or the subordinated lenders against Mr. Gross, nor was there any merit to theBuckley claim,that your client wanted cash and if he was to take some paper, it had to be personally guaranteed. My position was, as I left, that it was in the best interests of your client to go ahead, it was in the best interest of his sister to go ahead, Mabel Bleich. You had mentioned during that conversation, I think, your intention or the possibility that you might seek to restrain the transfer from taking place. I asked you to keep me informed of that. You requested that I keep you informed of what was going on, and we agreed that we would exchange documents, I would give you copies of everything, and that it was open, I guess, for either side to call.

Q This is your recollection of the meeting of January 15th? Are you mixing it up with other meetings?

A I only remember two meetings with you, although there might have been more. The other meeting was with many lawyers at the Golenbock office. The 15th meeting was at your office.

Q And you remember only one other meeting after that?

A Yes, I remember some phone calls, but not meetings.

Q All right, that is your recollection.

MR. SHAW: I object to the statement by Mr. Mandel.

Q With regard to Mabel Bleich and Jeanne Donoghue, were there a lot of claims against them?

A At that time I was totally unaware of Jeanne Donoghue's relationship with Gross and Company and I don't think any talk of claims against her was had at all.

Q How about Mabel?

A I think we were aware at that time that she was a general partner of Gross and Company and I think we discussed there might be claims against her.

Q So that you were aware, were you not, that Mabel Bleich and Jeanne Donoghue were limited partners with claims for $75,000 each plus interest, right?

A If interest had accrued, yes.

Q You are not sure about the interest?

A No.

Q But you are sure about the $75,000 figure?

A That was the amount of their claim, yes.

Q And you were asking them to give up their right to receive $75,000 each and take some paper in the new corporation?

A When you say I was asking, I was the spokesman that day but it was what the other limited partners wanted and the subordinated lenders and general partners were asking too.

Q It was a deal other people had worked out to their satisfaction, but that is what was wanted of Mabel and Jeanne?

A Yes. They wanted them to come along with the others.

Q And they had an absolute right to say no, did they not?

A Yes.

Q And if they said no all of the general partners wo had not withdrawn would be obligated to pay them their $75,000 each out of their private assets, if the firm's assets were not enough, until the last general partner went into bankruptcy?

MR. GRUTMAN: I object to the form of that question since it suggests it was immediately oweable and payable and there was no accounting and no offsets.

MR. SHAW: And this is his opinion based upon the partnership agreement, or what?

THE COURT: Read the question, please.

(Question read.)

THE COURT: Under what circumstances, Mr. Mandel? Under normal circumstances?

MR. MANDEL: On a liquidation of the firm, immediately, on a liquidationof the firm or if the firm was not liquidated, within six months from the date on which they had given their notice of withdrawal.

THE COURT: I will overrule the objection.

MR. SHAW: I object on the ground that this is a question of law and I respectfully address the Court's attention to Exhibit U.

THE COURT: Well, this is a question of what Mr. Persky understood at the time he was negotiating here to arrive at a settlement,and he said they had an absolute right to say no and Mr. Mandel is exploring what he understood would have happened under these circumstances.

Go ahead, you may answer.

A The answer is yes, with the modification -- in your question you said general partners who had not withdrawn, but my understanding was that general partners whether or nto they had withdraw if the obligation to Mrs. Donoghue and Mrs. Bleich had arisen while they were general partners, would be liable, so Mr. Gross would be liable to Mrs. Bleich and Mrs. Donoghue and the other limited partners.

Q That is an interpretation of the agreement and you are giving us your understanding?

A No, that is an interpretation of the general partnership law.

Q And the agreement, and it is your interpretation, right, and ultimately the Judge will have to tell us --

MR.SHAW: Objection, your Honor.

MR. ESTERMAN: Objection, your Honor.

THE COURT: Sutained.

Q It is certainly true that you recognize that all of the general partners would be liable personally to repay Geanne and Mabel their $75,000 if there was no offset, is that correct?

A Yes.

Q And against them there were no claims and no offsets whatsoever except the Buckley claim?

A Correct.

Q And it was completely clear, from day 1, that without the Buckley claim, Geanne and Mabel could come in and demand their $75,000 if this feal went through, right?

A Well, it was even more clear as to Jeanne Donoghue, until we learned she was a general partner. That didn't come up until later. Without offsets or without the Buckley claim, then I did not see any reason why if there was such assets why they would not receive the money.

Q Why they wouldn't have the right to be paid immediately?

A No, there was no right to pay immediately under the partnership agreement.

Q Under the transfer agreement?

A No. The partnership stayed in existence and the partnership would have owed the money to Mabel Bleich and Jeanne Donoghue under the partnership agreement. There was a payout period, not immediately. The corporation, in addition, had assumed that liability, to the extent it existed, and it was under the same payment schedule, because it inherited whatever the payment schedule was from the corporation.

Q So your opinion was that the corporation and the partnership would not have had to pay the money until six months later, until some time --

MR. SHAW: Is that the limited partners or the general partners --

THE COURT: Go ahead.

A I am sure it was not immediately. It was later.

Q That was your opinion. But if the execution of the transfer agreement were a breach of the partnership agreement, then the money would become due immediately?

MR. GRUTMAN: Objection, your Honor.

MR. SHAW: Objection, your Honor.

MR. MANDEL: I am asking for his understanding.

MR. SHAW: How can breach of agreement change its terms?

THE COURT: It is a question of what he understood it to be. I think Mr. Mandel is inquiring into the framework of these various factors, and the objection is overruled.

THE WITNESS: Could I have the question read back?

THE COURT: Yes.

(Question read.)

A I don't remember considering that problem in that context then, and as I sit here now, I don't know that I have an answer for you either way.

Q All right. It is true, is it not, that the assertion of the Buckley claim has been the only thing that has stoodin the way of Jeanne and Mabel getting the $75,000 owed to each of them since some period, would you say, is June of 1971?

MR. SHAW: Objection, your Honor.

THE COURT: On what ground?

MR. SHAW: It is like saying the only reason a person didn't receive money is that they are not entitled to money. It is argumentative.

THE COURT: Overruled. I think the witness understands the question.

A If the question is, is the pending litigation the reason why the money was not paid, I think the answer is yes.

Q My question was, the assertion of the Buckley claim is the only reason why Jeanne and Mabel could not get their money at least after June 1f 1971, is that correct?

MR. SHAW: I repeat the objection, your Honor.

THE COURT: I thought he answered that "Yes".

MR. GRUTMAN: The insinuation is that it is the exertion of the claim rather than the existence of the claim.

MR. SHAW: Look also at Exhibit P, where the limited partners insisted there are certain treatments --

THE COURT: Well, he already answered the question "Yes." He already said, two questions back -- am I right, about that, you said that except for that claim there was no reason they couldn't have been paid?

A I said except for the litigation.

THE COURT: And that involves the Buckley claim?

THE WITNESS: Yes, part of it.

THE COURT: But there is no litigation against those two other than Buckley, is that correct?

THE WITNESS: I believe so, yes.

THE COURT: Then you have your answer.

Q You knew in December of 1970 that if the transfer agreement were to be made the new corporation, your client, would be forced to assume all of the debts owed by the partnership?

A All of the known debts, yes.

Q And since all of the assets of the partnership were being sold by the partnership to the new corporation, if that provision for the payment of debts had not been made, the deal would have been a clear fraud --

MR. GRUTMAN: Objection, your Honor.

MR. SHAW: Objection, your Honor.

THE COURT: Read that back, please.

(Read.)

MR. MANDEL: A clear fraudulent conveyance, your Honor.

THE COURT: Any objection if he amends it?

MR. GRUTMAN: Yes.

MR. SHAW: It is a question like if you had done A, B, C and D, you would have lied.

THE COURT: He is asking whether at the time of this transfer he as a lawyer knew that it was essential to do this.

MR. GRUTMAN: That is not the question, Judge. It is deliberately couched in this sinister fashion as though if you took something without paying for it, it would be a crime, whereas if you paid for it, it would be a perfectly proper transaction. The law requires --

THE COURT: Let's get a stipulation to that effect, and I take it that is the witness' understanding?

THE WITNESS: Yes, sir.

THE COURT:Next question.

Q Do you recall that during the negotiations with the other people there were questions of whether they would be willing to make the deal if $150,000 were to be paid out to Jeanne and Mabel and the other limited lenders and subordinated lenders didn't get cash right away? Do you remember anything about that?

A That topic was discussed, but not the way you phrased it.

Q When was it discussed?

A Constantly.

Q Beginning when?

A I guess in November, when it became apparent that there was a chance of making a transaction, and the payout of cash was objected to by three different categories of people. Originally the exchange had said unless there is an influxion of new capital and all the other capital stayed in, they wouldn't approve the deal. They eventually backed off from that position and let the corporation set up the reserve. The limited partners and subordinated lenders took a very strong position that no money should go out while they remained unpaid if they were going to extend their debt instruments and take the debt instruments of the coproration, and the corporation, in a third category, at one point said "We agree with the exchange. We need every dollar we can to operate."

Q So that the deal would have been killed unless some way were found to hold Jeanne and Mabel and Charles Gross at bay in their demand for immediate payment?

MR. SHAW: Objection.

THE COURT: As to form, yes.

MR. MANDEL: I will struggle with the form, your Honor.

Q So that you knew that there could be no successful transfer agreement unless there was some way to show other parties to the agrement that 75,000 wouldn't have to be paid to Mabel right away and 75,000 wouldn't have to be paid to Jeanne right away and that Charles' claims would have to be paid right away?

A The answer really is no. I think unequivocally you are right, that there wouldn't have been an agreement if that money had to come out right away, but it wasn't due right away. If there had been no agreement, there would have been lawsuits, in any event, against Mr. Gross, by the general partners, limited partners and subordinated lenders.

Q This is your prediction and I move to strike it.

THE COURT: Yes, strike it.

MR.MANDEL: That was not responsive, your Honor.

THE COURT: Strike it out.

Q Please answer my question.

A If the money had to come out right away, there would not have been a deal.

Q If the money had to come out within six months, could there have been a deal?

A The way the agreement was finally drafted and approved and signed, it was perfectly contemplata-le that a Court might order a payment in six months.

Q They were taking a risk but they also knew the Buckley claim was going to be asserted within a few days, isn't that right?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A I don't think anyone knew whether or not the Buckley claim would ever be asserted.

Q I say, and I ask you whether you knew the Buckley claim would be the basis of a litigat : within a few days after this deal was finished?

MR. GRUTMAN: At what point in time is asked for that opinion?

THE COURT: Prior to the closing.

A No.

Q In fact, you had prepared a complaint in the partnership name beforethe closing?

A Yes.

MR. MANDEL: Your Honor, I have the original here, Exhibit X for identification.

THE COURT: All right.

A Yes.

Q You caused the preparation of that complaint on or about February 4th, did you not?

A It was prepared the day before we had the meeting at Golenbock and Barell, wheatever date that was.

Q You see a date on the complaint, do you not?

A I see a month and a year.

Q Do you see the date February 4, 1971?

A Yes, on page 7.

Q Do you see your signature, Robert Persky?

A Correct.

Q In this complaint you asserted only one claim against Charles Gross and Gross & Company, right, the Buckley claim, and nothing else?

A Correct.

Q No other claims?

A Correct.

Q Nothing else, none of this other vague --

MR. GRUTMAN: Objected to, as far as it has gone.

THE COURT: Sustained.

Q Who authorized you on behalf of the partnership of Newburger, Loeb to draw this document, which you never served?

A The Executive Committee.

Q Who werethey?

A At that time I guess was Bob and Andy Newburger -- I don't remember the other members -- I think one of the Sterns.

Q Were you present at a meeting?

A No.

Q Did they authorize you personally?

A No.

Q How didyou get the authorization?

A From Mr. Berkowitz.

Q Your client, Berkowitz?

MR. GRUTMAN: Objection.

MR. SHAW: Objection.

Q The member of the new group?

MR. GRUTMAN: Objection. This is argumentative.

THE COURT: Objection sustained.

Q Berkowitz wasnot a partner, washe?

A No.

Q As a matter of fact, when you drew this complaint on February 4th, the partnership did not even own the Buckley claim, isn't that right?

A I don't know that.

Q The Buckley claim, the Buckley assignment was in escrow until March? Right or wrong?

A I don't remember. It might have been -- until the last payment was made, possibly.

Q It was in escrow until March, and haven't you so testified?

A I may have. I don't remember.

Q You remember the papers? Is your recollection refreshed now?

A What papers?

Q The settlement papers regarding the Buckley claim.

A I remember it was in escrow, I don't remember the date on it.

MR. GRUTMAN: My recollection is, your Honor, the settlement was on or about December 17th --

MR. MANDEL: Well, let's talk about the documents.

THE COURT: Let's find out from the witness.

MR. SHAW: There is an escrow agreement, your Honor, which I am looking for right now.

MR. GRUTMAN: March of '71.

MR. MANDEL: Here it is.

Q I show you Plaintiffs' Exhibit 48 and I ask you whether it is not true that the assignment of claims to Newburger, Loeb was placed in escrow, under 48?

MR. GRUTMAN: Could we have"escrow" defined so that the jury understands it?

THE COURT: Let's not interrupt the flow of the questions here. We will do that, but let him answer first.

Q Can you answer my question?

A Yes. The answer is yes.

Q It was in escrow?

A Yes.

Q And it wasn't released from escrow until some time in March?

A If the second payment was actually made in March, the answer is yes.

Q So that when you drew your first complaint on behalf of the partnership, which you never served before the transfer agreement and you drew your second complaint on behalf of the corporation, which you did in February, you were bringing suit on a claim which neither of those parties owned at the moment you started the suit, is that right?

MR.GRUTMAN: Objected to, your Honor.

THE COURT: Overruled.

A The first complaint was not drawn for the purpose of starting suit. It was drawn for the purpose of giving it to you so you could see in writing the claim.

MR. MANDEL: I move to strike and ask him to answer my question.

THE COURT: I will let it stand.

Q How about the second complaint?

A I didn't have anything to do with that. It was turned over to the litigation department. I may have signed it but I didn't draft it.

Q It is exactly the same as the first complaint, isn't it?

A It may be. I don't know.

Q You don't know? You have been a party in this case for all these years --

MR. GRUTMAN: Objection, your Honor.

THE COURT: No, overruled.

A I don't know whether --

Q You have been accused in this case of fomenting a baseless claim based on the Buckley claim, isn't that right, against Gross, Bleich and Donoghue?

MR.SHAW: Objection.

THE COURT: Overruled.

A That is the claim.

Q You have never bothered to look to see what claim it is?

A I didn't say that. All I said was I never bothered to look to see whether the two documents were identical.

Q All right. Look now. Except for the name of the plaintiff, is there any difference?

THE COURT: Do you represent there is no difference?

MR. MANDEL: As far as I know, there isn't.

MR. SHAW: As far as that goes, your Honor, if there is any difference, we will bring it up tomorrow.

MR. MANDEL: Is this a good time to stop, your Honor?

THE COURT: It probably is.

Ladies and gentlemen, 10:30 in the morning.

(Jury leaves the courtroom.)

(Adjourned to Tuesday, July 1, 1975, at 10:30 a.m.)

rmb-1

Newburger, Loeb & Co., Inc.
et al

vs. 71 Civ. 685

Charles Gross, et al.

New York, New York.
July 1, 1975 - 10:30 A.M.

(Trial resumed.)

(In open court; jury present.)

ROBERT S. PERSKY resumed.

CROSS-EXAMINATION (continued)

BY MR. MANDEL:

THE COURT: Good morning.

THE CLERK: Mr. Persky, you remain sworn.

MR. GRUTMAN: Your Honor, before Mr. Mandel resumes, a request was made yesterday that we attempt to find our computer runs on certain billing for 1971. I don't say this is complete, but I have what computer runs there were and it shows there was $5,533 in fees outstanding, and $35.75 in disbursements.

MR. MANDEL: I don't understand.

MR. GRUTMAN: That is all I could retrieve.

MR. MANDEL: You mean you cannot find out from your records how much Newburger, Loeb, Inc., was billed for the work leading to the transfer agreement on February 11?

MR. GRUTMAN: All I can find are computer runs that end on September 13, 1971, and they show fees of $5,533, and disbursements, 35.75. There may have been some greater than that paid from the time the work started, since I find in the computer runs disbursements in the Buckley matter of 2465.15, a portion of which I assume was paid, since as of September 13, 1971, the disbursement s not paid are 35.75, $35.75.

MR. MANDEL: Your statement, Mr.Grutman, I take it is that the computer run shows what was open as of a certain moment?

MR. GRUTMAN: I can only say this is all of the computer run I can find, and here it is.

MR. MANDEL: Inother words, you have no way of finding out what the fee was that was paid for this particular job?

MR. GRUTMAN: That is correct, I can do no better in the time you have given me than to give you the information I have supplied.

MR. MANDEL: I will keep the request open --

THE COURT: Does your firm maintain a file of bills?

MR. GRUTMAN: No, your Honor, we don't keep them for that many years.

THE COURT: When you send a client a bill, you don't keep a copy?

MR. GRUTMAN: No, sir. When the bill is paid, the computer is wiped off and the bill is destroyed.

MR. MANDEL: How about your client, Mr.Shaw, does it show how much was paid by --

MR. SHAW: I only came into this case a year ago.

THE COURT: Mr. Shaw will undertake to find out, Mr. Mandel.

MR. SHAW: I will speak with Mr. Risher and see what I can come up with.

BY MR. MANDEL:

Q Mr. Persky, in speaking to you yesterday about the individuals who were forming the new group to acquire the business of Newburger, Loeb, who were your individual clients, I neglected to mention the name of Sloane. Was Sloane a member of that group?

A I have no conscious recollection of Sloane being around. I think he was in California during this time and I don't know what arrangements he had made to participate in the on-going business.

Q You do know, do you not, that he got the same kind of stock at the same price as Risher and Muh at the closing, is that right, on February 11?

A I don't know about amount, but --

Q I didn't say amount, I said the same kind.

A The nature, yes.

Q And the same price?

A I don't know about the same price. Price was calculated in a very arbitrary fashion. There was no book value to common stock and the Exchange required a minimum investment of $10,000. So if someone was getting less than someone else, their price per share might have been higher because it had to aggregate $10,000.

Q You have available your closing binder, do you not?

A Yes.

Q Can you ascertain from this how many shares Sloane got on February 11 and at what price?

(Pause.)

A Unless I am missing it, I don't see anything in here that gives, as to Mr. Sloane, the number of shares. The NASD application asked for the names and number of shares of people getting more than 10 per cent --

Q Is the schedule attached to the transfer agreement itself?

THE COURT: Can you help him to find that, point it out,in the interest of time?

A I see. Schedule F has 50,000 shares for Mr. Sloane, but no price.

Q 50,000 shares of voting stock, right?

A It doesn't say voting, but my recollection is voting.

Q He is right on the page with Muh and Risher?

A Right.

Q And Kayne?

A Correct.

Q And so it would be 50,000 shares at five cents per share, right?

A One-twentieth of 50,000 is what?

Q I will withdraw the amount. I will withdraw the question as to what he paid --

A His price may have been twenty cents, if it had to come out to be $10,000.

MR. MANDEL: I would like to offer this whole binder, your Honor, so we won't have any questions of missing documents as to what happened on the night of February 11th.

MR. SHAW: I object upon the ground that it contains so much information that is a duplication and is voluminous and unnecessary and will clutter the record. I have no idea what is relevant and what is not relevant in there and if there is something Mr. Mandel thinks is important, I think he should point it out to us rather than just hit us with a five-pound document.

THE COURT: This which shall be marked Defendants' Exhibit Y for identification is the concededly authentic set of the papers of the closing of the evening of February 11, 1971, is that correct?

MR. GRUTMAN: No, I think it may be more than that, Judge. It is Mr. Bamberger's closing binder, and it may have a number of papers that were not annexed as exhibits to the transfer agreement. That is readily apparent from the difference between the size of Exhibit 24 in evidence and Exhibit Y for identification.

THE COURT: Mr. Persky, what is Y for identification, how would you describe it and what is contained in it?

THE WITNESS: The first document in there, under Tab Number 1 --

MR. SHAW: Objection, your Honor. This is not the right approach, I don't think

THE COURT: I would like to understand whether these are papers that were considered and executed and were part of an overall package on the night of February 11, 1971.

THE WITNESS: Well, in one sentence, the majority are, but not every one of them. The first document, for instance, is a summary prepared some time subsequent to that of what transpired that night. It is what lawyers call a closing statement. Then there is an index and then --

THE COURT: Did Mr.Bamberger prepare that?

THE WITNESS: Yes.

THE COURT:And this was under your direction, I assume?

THE WITNESS: Yes. Then documents 3 through 29 -- no, 3 through 28 -- would have been documents executed the night of the closing. Document 29 was a letter sending some of those documents in the New York Stock Exchange; 30 is the certificate of incorporation and the bylaws, filed at another time. Then there are a whole series of documents relating to subsequent approvals from the New York Stock Exchange, State of New York, State of Connecticut, State of California, NASD advertisements of the reorganization that appeared in the Wall Street Journal.

MR. GRUTMAN: These are the things lawyers put on their shelves to impress clients, your Honor.

I don't think we have to put it into the record of this case.

MR. SHAW: Your Honor, with respect to the subsequent approvals by various agencies, I think your Honor made a ruling that some of those are not relevant.

THE COURT: I will admit Exhibits 3 through 28, therein so tabbed, together with the index, and excluding the closing statement, at this point.

MR. GRUTMAN: Fine.

MR. MANDEL: Fine. Thank you.

(Defendants' Exhibit Y was received in evidence.)

THE COURT: Y is received in evidence to the extent the record reveals.

BY MR. MANDEL:

Q After the closing, or before the closing, Sloane was a director of the new corporation, wasn't he, as well as a stockholder?

A Yes,Sloane was one of the directors.

Q He was one of the officers of the corporation, wasn't he?

A Yes.

Q And he was closely associated with Kayne, was he not?

A He worked in the same office with Fred Kayne.

Q And he and Fred Kayne came to Newburger, Loeb together, or Sloane brought Kayne in, is that correct?

A That happened before I arrived on the scene. I don't know.

Q I bring you back, Mr. Persky, to the meeting in my office of January 15, 1971, about which you testified yesterday, when you were there with Muh and Risher and I was there with Mr. -- Mr. Mandel was there with Mr. Gross and there were conversations which ended with your leaving my office not being satisfied or gratified with your results, is that correct?

A I would say that neither of us was satisfied or gratified.

Q You and Muh and Risher immediately put in a telephone call to Sloane and Kayne in California, right after that meeting, didn't you?

A Yes -- I don't know about Sloane, but Kayne.

Q Immediately after that meeting?

A From your lobby.

Q From my lobby. What did you tell Kayne?

MR. BIEHL: Objection, your Honor.

THE COURT: You are representing Kayne?

MR. BIEHL: That is correct, your Honor.

THE COURT: Mr. Mandel, let's find out who Mr. Persky was representing.

Q You were representing Mr. Kayne, is that correct, at that time?

A I don't remember whether this was during the period that he had withdrawn in disgust from the negotiations --

THE COURT: Was this conversation the subject of any prior testimony?

MR. MANDEL: Not yet.

THE COURT: Was it ever explored in an examination before trial?

MR. MANDEL: Not to the best of my recollection.

THE COURT: There may be a basis for an attorney-client privilege there.

MR. MANDEL: There may be.

Q Let me ask: Was this a confidential communication between you and Mr. Kayne?

MR. BIEHL: I object, your Honor.

THE COURT: Yes, I will sustain the objection.

MR. MANDEL: Well, your Honor, not every attorney-client communication is privileged, only confidential communications, and it is incumbent upon the person who asserts the privilege to prove it.

If Mr. Persky was Mr. Kayne's attorney at this moment, and I believe he was, and if he says this was a confidential communication, that is the end of it. Unless he is willing to say both things, I am entitled to the contents of the communication. I may be shouting too much, your Honor, but I am sure that --

THE COURT: My concern is whether the word "confidential" isn't a word of art, like an agent saying "I was an agent."

MR. MANDEL: That is the established test,your Honor.

THE COURT: That is the word of art that is the capstone of all the evidentiary statements.

Was this, Mr. Persky, communication one on the basis of which -- was this one that you and your client were discussing matters that were not to be revealed to anybody for purposes ofmaking legal decisions as to his rights or his steps?

THE WITNESS: My recollection of the conversation was such that I would have made it in front of Mr. Mandel.

THE COURT: All right.

MR. GRUTMAN: I want it clear that any objection made is not made because there is an intention to withhold information from the subscriber, but that as a lawyer one cannot make a disclosure without the permission of the client.

THE COURT: Ladies and gentlemen, I will say to you, and Mr.Grutman has a good point, that where an attorney and a client have a relationship in which they talk about things in confidence, the attorney, by law, is forbidden to reveal the subject matter of that conversation. That privilege is the client's privilege to either enforce it or to give it up.

Mr. Kayne's lawyer here is asserting that the privilege exists and he on behalf of Mr. Kayne is not prepared to waive it, as we say.

MR. BIEHL: At this point, your Honor, I would like to point out also that at that time Mr. Persky was representing the corporation formed at the end of December, and I am not even clear whether or not that privilege does attach to the corporation and Mr. Kayne as an incorporator.

THE COURT: Mr.Shaw is not asserting any corporate privilege.

MR. SHAW: I am not,your Honor.

MR. MANDEL: Your Honor, I am anxious to avoid any possibility of error on this point.

THE COURT: I will give consideration to this. You have established that he called Mr. Kayne and go on to another --

MR. BIEHL: Inasmuch as Mr. Persky said he would have made this statement to Mr. Kayne in front of Mr. Mandel, I will withdraw the objection.

THE COURT: Very good.

You may answer.

Q What didyou tell Mr. Kayne in that telephone call?

A I tried to repeat to Mr. Kayne the substance of the conversation betweenyourself, Mr.Gross, myself and Mr. Risher that had just transpired at your office.

Q And Mr. Muh?

A And Mr. Muh.

Q Did you tell him we were pretty tough about it?

A I think, because Mr. Kayne was concerned about this, I said that Mr.Gross would rather see the partnership go into bankruptcy than go along with the transaction.

Q Did you say brankruptcy or liquidation?

A I think I used the word "bankruptcy," because that was Mr. Kayne's major concern. Don't forget, he had been a partner and if the partnership went into bankruptcy, he would have gone into bankruptcy.

Q The fact is that Gross said at the meeting he preferred an orderly liquidation?

MR. SHAW: Objection, your Honor. Didn't we go over this yesterday?

THE COURT: Overruled.

Q Isn't that what you testified yesterday your notes show?

A What I testified yesterday was that your position was, on behalf of Mr.Gross, that an orderly liquidation would result in something being left for the general partners. Our position and those of the other parties to the proposed transaction was quite to the contrary, that it would result in bankruptcy. Mr. Kayne's concern was bankruptcy.

Q So you told Kayne that Gross and Mandel said they preferred a bankruptcy, is that your testimony?

A That is the way I interpreted what you were saying.

Q I would like to move now to your handling of the Buckley churning claim. You testified on direct that this file came to you when, in November or December?

A My recollection is some time in November or early December.

Q At that time Mabel Bleich and Jeanne Donoghue were partners who had not given notice of withdrawal, right?

A Limited partners, yes.

Q And Charles Gross was a partner who had given notice of withdrawal but his capital was still being held by the partnership at the risk of the business, is that correct?

A That's correct.

Q Under the formula for determining how much money Gross would be entitled to, he still bore some proportion of the losses or gains that would be incurred by the firm until the end of the calendar year, is that correct?

A Yes.

Q Do you remember that?

A Yes.

Q That is correct?

A Yes.

Q In handling the Buckley claim you were acting as attorney for the Newburger, Loeb partnership?

A Correct.

Q And not as attorney for the new group trying to buy the business, is that correct?

A Correct.

Q The new group had no interest, legal interest, in the churning claim and no legal relation to it at the moment, is that correct?

A Correct.

Q So you were acting as attorney for the partnership and the partners, is that correct?

A For the partnership.

Q Did you recognize that the partnership had a fiduciary duty to the partners?

A I recognized both that and that the partners had a fiduciary relationship to the partnership.

Q Did you recognize that as attorney for the partnership you also had a fiduciary duty to the individual partners?

A Not where their interests conflicted with the partnership, which was a separate entity.

Q So you felt that where there was a difference between partners and the partnership about partnership business, you were free to treat the minority partners as though you had no fiduciary responsibility to them?

A No, that is not what I said.

Q All right,you explain it.

A Isaid that a partnership is a legal entity and that there is a duty of each partner to the partnership and occasionally you find a partner is acting in conflict to the partnership and the attorney for the partnership has to see that the partnership is his primary interest and if that person -- I am not saying that is the case here, but I want to make it clear -- if the partner is stealing money from the partnership, then the obligation of the attorney for the partnership is to go after that partner and get that asset back, and you can't have a fiduciary relationship to that partner in relation to that act.

Q Did you feel you had a fiduciary duty to Bleich and Donoghue to handle the Buckley matter in a way that was fair to them?

A Yes. They were creditors, to the extent they were limited partners -- they were senior to general partners. When I got the Gross claim, the one that Webster, Sheffield had developed, I was unaware of the relationship of either Mrs. Bleich or Mrs.Donoghue to Gross & Company.

Q But you learned of that relationship before the closing, did you not?

A As to Mrs. Bleich, but not as to Mrs.Donoghue.

Q And you knew from the outset of Mr. Gross' relationship to Gross & Company, is that correct?

A At the outset, when I got the file, yes.

Q Did you feel or recognize that you had an obligation as attorney for the partnership to make sure that you and the partners treated Gross' interests fairly and in good faith?

A Let's take his interest separately. His interest in relationship to the Buckley claim, because of his prior affiliation with Gross & Company, was directly and clearly adverse to Newburger, Loeb & Company, the partnership.

Q You made that determination, is that correct?

A Basedon the facts recited in the Webster, Sheffield counterclaim.

Q Did you feel that you had any obligation before seeking to pursue Mr.Gross and the other partners of Gross & Company who were also partners of Newburger, Loeb, to make sure that the claims against them were not flimsy poppycock?

A Mr. Mandel, I don't think it was my job or the job of any attorney to be the trier of fact. There were sufficient transactions in the file I got to raise in my mind a bona fideness of the claim. Whether or not it would be ultimately decided one way or the other was not my job, but clearly, as a pure matter of law, not a question of fact, not a question of discretion, that when that claim had been made against Newburger, Loeb reciting the fact that Gross & Company was the originating broker, that a minimum precaution, a minimum step would have been a cross claim-over against Gross & Company, and that is all that I did. I picked up that cross claim on behalf of the partnership because it was an asset of the partnership.

Q Are you saying there is no difference between a cross claim and an assignment of a claim?

A As a practical matter, at that point there was not.

Q A cross claim means a statement by the defendant saying "I don't know if there is any validity to this claim or not, but if there is, then somebody else owes me the money", is that correct?

A No. Someone else is liable or responsible.

Q Is liable or responsible to me if I am responsible to the plaintiff.

A Well, maybe directly, not just to the intermediary.

Q A cross claim in this case would have been to say, "We are bringing Gross & Company into the arbitration. We are not saying that Buckley is right. If Buckley turns out to be right, we want Gross & Company to reimburse us for any damages which we suffer"? Would that have been a cross claim?

A If the arbitration had continued, that would have been the cross claim.

Q Now, an assignment of a claim is quite different, isn't it, Mr. Persky?

A Not in this context.

Q All right, an assignment of a claim is one where the defendant, in this case the partnership, says, I will buy Buckley's claim for a penny or a dollar, or for nothing, and I will then take the position of standing in Buckley's shoes and saying, "You were wrong, you did something bad, and I want to make a profit on it."

Isn't that what the assignment of the claim means?

A Not really. At that point we were settling the arbitration, that was being discontinued. The cross claim had not been asserted by Golenbock & Barell. The only thing we could preserve was the substance of that cross claim that should have been asserted. As part of the settlement in addition to the cash Buckley was paying, he was giving us the rights that would have flowed through that cross claim. Whether or not those rights would have been successful was an issue to be determined later.

If the partnership had gone into bankruptcy, the receiver would have made up his mind as to whether or not to pursue the claim. You are putting different labels on the same set of facts.

Q It is your testimony here as an attorney that there is no difference between a cross claim and an assignment?

A And it is my testimony that in substance what was happening here was the same thing as would have happened had there been an assertion of a cross claim, but since we were settling, it had to be done by assignment.

Q There was another alternative open besides taking an assignment, wasn't there? There was the alternative of bringing a separate action against Gross & Company, saying, "We suffered some damage because of something you did and we want to be made whole for the damage"? There was a possibility, wasn't there?

A Yes, I think that is partly what is going on here.

Q And that is entirely different from taking an assignment of the cross claim?

MR. GRUTMAN: I object to that as argumentative, your Honor, as a matter of law.

THE COURT: No, overruled.

A That would be, I guess, in lawyer's language, a separate cause of action.

Q Well, it is a contractual cause of action on behalf of the partnership itself rather than a purchase of Buckley's claim and standing inBuckley's shoes? Those are different things?

A But they arose out of the same operative facts.

MR. MANDEL: I move to strike.

THE COURT: Strike it out.

Q Now, answer my question.

MR. GRUTMAN: Objection, your Honor.

THE COURT: Overruled.

Q Those are different things, aren't they?

A They have different legal labels, yes.

Q They have different meanings and consequences, do they not?

A No, the consequences would have been the same.

Q The consequences of a victory on the Buckley churning claim would have been the amount of theBuckley claim, right?

A It may or may not be.

Q The consequences of a victory on a damage action would have required Newburger, Loeb to prove that it had been injured in some way, right or wrong?

A It would have been dollar losses.

Q It would have been different?

A I don't know whether they would have been different.

Q All right. Now, are you also and were you then also familiar with the law that a joint tort feasor may not purchase the claim of the person damaged?

A I don't know that that was the law now or then. That is not an area I have any expertise in.

Q You never heard of that? When you looked at theBuckley file, you saw that the claim was made by Buckley for the first time in 1970, right?

A I think that was the time of the counterclaim.

Q And you saw that the thing complained of occurred between 1962 and 1966, right?

A I think those were the dates.

Q And you saw that between 1966 and 1970 neither Buckley nor his lawyers, eminent lawyers,Webster, Sheffield, ever made any claim that something wrong had been done?

A Well, neither had Newburger, Loeb commenced an action.

Q Answer my question.

THE COURT: The answer is you saw that?

THE WITNESS: Yes.

THE COURT: Strike out anything else.

Q And you saw in the file that in 1969,or 1968, Buckley and his attorneys, Webster, Sheffield acknowledged the validity of Newburger, Loeb's position, that they were entitled to something on the debit balance, by taking stock from the Merrill Lynch account of the Buckleys and handing it over to Newburger, Loeb? You saw that in the file, didn't you?

A I don't remember that in the file.

Q You don't remember knowing that fact?

A No, and I don't know it today.

Q You also saw in the file, did you not, that --

MR. GRUTMAN: Your Honor, I object to the "You also saw." The witness says he has no present recollection of having seen what is incorporated from the antecedent question and it is grossly improper to say, "You also say."

THE COURT: Overruled.

Go ahead.

Q You also saw in the file that the Buckleys had furnished a financial statement showing their inability to pay in full, right?

A That is correct.

Q And that they had certified that statement as true?

A I thought it was the attorneys who represented it was true. I didn't remember --

Q You don't remember that Mr.Silverman asked and got a letter signed by the Buckleys themselves saying that the balance sheet was accurate?

A I remember the balance sheet and I don't remember who made the representation.

Q And you also saw, did you not, that the Buckleys had an offer in the file, or the file showed that Buckley's father was willing to make a payment to Newburger, Loeb to settle that deficit balance? You saw that and understood it, did you not?

A There was a settlement offer reflected in the file.

Q A settlement offer that the Buckleys' father would pay?

A Yes.

Q You saw and understood that, and you saw and understood from the file, Mr. Persky, that the Buckleys asserted their claim only after they were sued by Newburger, Loeb?

A That is correct.

Q As an attorney, Mr. Persky, you are aware that in many, many cases it is a tactic in litigation for a defendant with a weak case --

MR. SHAW: Objection, your Honor. Can't we limit it to this case, not cases in general? The question, I submit, is improper.

THE COURT: No, from this witness I will permit it. It is a question of whether he so assessed this situation against that light.

Overruled.

Q That a defendant will interpose counterclaims, flimsy and insubstantial, in order to give him some leverage in bargaining?

A I am confused. Are you talking about this case?

Q I am talking about general tactics.

THE COURT: You are aware that has happened in litigation in general?

THE WITNESS: Oh,yes. Mr. Mandel did that.

MR.MANDEL: I move to strike that.

THE COURT: Strike it out. That was not asked of you, Mr. Persky, and please don't volunteer.

You are just aware generally that that has happened in the field of litigation --

THE WITNESS: Some counterclaims are valid and some are not. Mr. Mandel's assertion that it is a general proposition is wrong.

Q Reviewing the file, did it occur to you that the counterclaim of the Buckleys was not necessarily substantial?

A It occurred to me that Newburger, Loeb would not necessarily prevail or that Buckley might necessarily prevail. I think in every litigation there is a substantial chance of the case going either way.

MR. MANDEL: I move to strike.

MR. SHAW: I object, your Honor.

THE COURT: No, I will let that stand.

Q It was incumbent upon you, was it not, to determine just how strong or weak that Buckley counterclaim might be?

MR. SHAW: Objection, your Honor. I think that is the ultimate fact for a jury to determine, not an attorney.

MR. GRUTMAN: Objection, your Honor.

THE COURT: No, in the context in which it is being asked, overruled.

A YOu are going too far. I think it was my obligation to determine whether there was a prima facie case that required the partnership to have it in its possession in the event it was deemed to be an asset that might be used in liquidation.

Q What made this a prima facie case, in your opinion?

A In my experience with churning claims, and I had been on both side of them representing brokerage firms where claims were made against them and representing individuals where they were asserting a churning claim, the number of trades in the account was a significant factor. It was also a significant factor when the SEC issued its releases in describing what it considered to be churning.

There were sufficient trades in the Buckley account to raise in my mind a question, and I am not trying to tell you that I determined whether it was right or wrong, but I am just saying it raised a question.

Q Newburger, Loeb had a director of compliance at that time?

A Yes.

Q His name was Richard Miles, is that correct?

A No, it was Larry Berkowitz.

Q Was Richard Miles at Newburger, Loeb during November of 1970?

A If he was, I didn't know of his existence.

Q You did not ask Richard Miles his opinion of the case?

A The first time I heard Mr. Miles' name was in your opening.

Q You did not call Mr.Silverman, your predecessor, in handling this case to ask him for any information about it?

A There were sufficient memos from Mr.Silverman in the file to acquaint me with his analysis of the case.

Q You didn't call Mr. Jordon to ask him for what actually happened, did you?

A No.

Q Did you believe it was a discretionary account?

A I believe the record reflected it was a discretionary account.

Q What was there in the record to reflect it was a discretionary account?

A I don't remember what document or what memo led me to believe that.

Q So that your activities and subsequent actions were based on the idea that this was a discretionary account?

MR. SHAW: Objection.

THE COURT: Overruled.

A No, it wouldn't have made any difference to me whether it was discretionary or not discretionary.

Q With your knowledge of the law of churning, which you told us was based on a number of cases on both sides, didn't it occur to you that an essential element in a churning case is whether the trades are made at volition of the customer or at the volition of the broker?

A That is one of the elements.

Q You knew that; didn't you?

A Yes.

Q But you didn't take the trouble to find out whether it was a discretionary account or not; you just assumed that it was?

A Why is that? I said there was something in the file that led me to believe that.

Q What was it?

A I don't remember, Mr. Mandel.

Q That wasn't Mr. Buckley's claim; was it? Refresh your recollection by looking at that, if you are not sure. The Buckley's never said it was a discretionary account in their pleading.

A My present recollection is that it was from something in the file. It is a thick file -- a big red envelope -- but I don't remember what document led me to believe that.

Q Your law firm had it and has it, so show me the piece of paper.

MR. GRUTMAN: Your Honor, I must object. We have had no request for the production of this document and the sudden outburst by Mr. Mandel that we must yield up a piece of paper -- look what is there; let Mr. Mandel find it.

MR. MANDEL: There is no such piece of paper; you know it; you know it and I know it.

THE COURT: We are not going to have a little theatrical performance down here in the pit. Where is the file?

MR. GRUTMAN: It is over there, your Honor.

THE COURT: Would you go over and put your hand on it and give it to Mr. Mandel.

MR. GRUTMAN: We were required to yield these up and they have been reintegrated from papers Mr. Shaw had and that were in the file and I can't find that now.

THE COURT: I don't want to give an advantage or disadvantage to anyone by reason of what is being said here, but you say the file is somewhere on that table; am I correct? You say the papers are on that table?

MR. GRUTMAN: I am not sure of that.

THE COURT: Ladies and gentlemen, we will stand in recess for some 15 minutes and in the interim we will see what we can find on that table.

(Jury leaves courtroom)

MRS. BJORK: Your Honor, I have been responsible for this file. It has been in the custody of a number of different attorneys and there is no such thing as the original Buckley file.

THE COURT: The problem as I see it, in the swiftly-moving language I heard here at the close of this session, is that Mr. Grutman with effective advocacy said, "It's over there.", in substance, to counter a demand of Mr. Mandel that he thought was abrupt, and he swept his arm and said, "It's over there." If that was an ill-considered remark, it was nevertheless stated and if Mr. Mandel -- in my judgement, Mr. Mandel is entitled to show Mr. Persky this file for this purpose, because it is conceded this is a non-discretionary account.

MR. GRUTMAN: That's correct.

THE COURT: Mr. Persky's opinion in connection with the use of this Buckley claim is a question for the jury. If Mr. Persky is in error or otherwise as to the nature of this account, as to whether it is discretionary or not, I think he is entitled to demonstrate the basis for his conclusion. You having said, Mr. Grutman -- there is a lot of this that goes on here between counsel, trying to ploy with each other in front of the jury to get a little one-upmanship one way or the other, and it is not all one-sided, but that statement has caught up.

MR. GRUTMAN: This is not the first time that Mr. Mandel without any forewarning has simply dropped in our laps a demand that we turn over something.

THE COURT: But it is to be forgiven in this instance because the witness all of a sudden says, "I saw a piece of paper in the file that said it was discretionary." How does a cross-examiner know he is going to get there?

MR. GRUTMAN: I am sensitive on this point for the following reasons: one, talk about good faith, the inability of someone to produce a piece of paper that allegedly he possessed may be taken by the jury as an attempt on our part to bury something. There has been no such attempt on our part. Mr. Mandel drops these things and what has made it thoroughy onerous is the file here is a behemoth and we had to give that file up -- whatever we had pursuant to your order -- and we turned it over to Mr. Shaw, and, like a playing card deck, these papers have come and gone between the hands of lawyers.

We do not have and I do not recall in the last several months, when we have been trying to put this together, an origianl Buckley file among the plethora of papers I pored over there. If I had such a paper I would not object to producing it, but, your Honor is asking me to go to the enormous mass of files and find the paper there.

THE COURT: With a sweep of your arm you said, "It is over there."

MR. GRUTMAN: No, the file is there.

THE COURT: You said, "The file is there.", and a reasonable man would conclude from that that the Buckley file was there.

MR. MANDEL: I have to come back and say he can't find a piece of paper and he does not know what is is.

THE COURT: There is no problem with anyone's bad faith; it is just a question of what the record showed. Mr. Mandel asked for a document that is perfectly proper for him to ask for, given the cross-examination point he hit with the witness and, if anything can be done, it should be done and, if nothing can be done, then it can't be done.

MR. GRUTMAN: If Mr. Mandel anticipates asking for documents there are procedures that should be followed --

THE COURT: He is cross-examining a critical witness in an area that he does not necessarily know what he may want to call upon next, and, therefore, if I were in his shoes, I wouldn't be able to foretell what --

MR. GRUTMAN: When the jury returns, would your Honor deal with the problem created by my inability to deliver it up by making it so that it does not appear somebody is hiding something --

THE COURT: Let's see what you come up with and we will deal with it accordingly.

We will stand in recess.

(Recess taken)

ROBERT S. PERSKY, resumed.

(Jury present)

CROSS-EXAMINATION (continued)

BY MR. MANDEL:

THE COURT: Mr. Grutman?

MR. GRUTMAN: We have gone through those papers, your Honor, and I think we have come up with a document which may be shown to the witness to refresh his recolleciton.

THE COURT: May we mark that for identification?

MR. GRUTMAN: It is already marked, your Honor.

THE COURT: What is the number?

MR. GRUTMAN: I believe it says 28, your Honor.

THE COURT: Exhibit 28 in evidence?

MR. GRUTMAN: Yes, your Honor.

MR. SHAW: Your Honor, at the outset I marked a number of exhibits relating to the Buckley claim which were not read to the jury. There are about 30 exhibits which were so marked.

THE COURT: All right.

MR. GRUTMAN: All I would stipulate for the record, your Honor, is there is no dispute that the Buckley account was not a discretionary account.

MR. MANDEL: We accept that stipulation.

MR. GRUTMAN: I don't think there is any doubt about it.

BY MR. MANDEL:

Q Mr. Persky, you were asked to produce the piece of paper from the Buckley file which told you that the Buckley account was discretionary, and have you now found such a piece of paper?

A I have been given one piece of paper, not the whole file to go through, because we can't find it, and it may have been this paper which led me to believe that at that time.

Q And the piece of paper is Exhibit 28, which is the answer set-off and counterclaim that Buckley put in in the arbitration; is that correct?

A Correct.

Q I asked you which counterclaim sets forth the churning charge. It is the first counterclaim, isn't it, beginning on page 3 of Exhibit 28?

A Yes.

Q The counterclaim does not say it was -- the churning counterclaim does not say it was a discretionary account; does it?

A No.

Q It says the opposite; does it not?

A It really doesn't say anything, but I was led to my error by another sentence on a different page.

Q Let's see what the churning counterclaim says first --

MR. SHAW: Objection, your Honor. Aren't

we far afield at this point?

THE COURT: Overruled.

Q I ask you to look at page 3, which is the churning counterclaim, right?

A

Q Paragraph 3-A.

A Right.

Q Doesn't paragraph 3-A say, in part, and I am reading from the fifth line, "Gross & Company encouraged and implemented a total of 1,110 transactions."? Are those the words used?

A Yes.

Q That is not the same as they did it in their own discretion, is it? It is the opposite.

A It is not the opposite. It is a little ambiguous.

Q Then, paragraph B says, "All of these trades were made pursuant to the advice of a registered representative of Gross & Company, petitioner's agents and respondents acquiesced to said representative's suggestions." Isn't that the opposite of discretionary account?

A Not exactly. I am willing to concede that I was in error, that it was not a discretionary account.

If you want an answer to your first question, I will give it to you.

Q But these paragraphs, about the churning, do not say it was a discretionary account and at least suggest, at the very least suggest, that it was not a discretionary account. That's right; isn't it?

A You are right; I was wrong.

Q Now you say there is something else elsewhere in this paper that made you think that it was a discretionary account. What is that something else?

A Apparently what stuck in my mind was the phrase on page 2, paragraph sub E, second line, which says, "in its sole discretion" and that must have stuck in my mind and stayed there.

Q Sub B, this is part of set off, right?

A Yes, sir.

Q And the set off has to do with the failure to sell out the stock on the resumption of trading in 1969?

A Correct.

A And Gross & Company was no longer in existence then, right?

A I am not sure when it merged in.

Q Mr. Gross was already a partner of

Newburger, Loeb; is that correct?

A I don't know.

MR. MANDEL: Will counsel concede it.

MR. SHAW: What was the date?

MR. MANDEL: 1969.

MR. SHAW: He became a partner as of January 1, 1969, but I don't concede Gross & Company was dissolved as of that point.

Q You knew that Gross & Company did not hold the Westec stock and had no power to sell it in 1969, right?

A Yes, that would have been true.

Q Paragraph B, on page 2, as part of the set off, says, "On the resumption of trading in Westec, respondent's holding in Westec stock" -- and respondent means Buckley?

A Yes.

Q "Buckley's holdings in Westec stock which amounted to 11,300 shares accounted for the entire value of the securities held in the margin account which respondent ", meaning Buckley, "maintained with petitioner" and petitioner is Newburger, Loeb, right?

A Right.

Q "On June 9, 1969, respondent Buckley

delivered additional 2,500 shares of Westec to petitioner."

Are we with each other so far? Buckley's giving stock to Newburger, Loeb.

A You are reading it accurately.

Q Going down to paragraph E, which is the one you rely on, right?

A It is the one I erroneously interpreted, yes.

Q The claim was this, and reading paragraph E, "Contrary to the duties and rights enumerated above, petitioner -- ", meaning Newburger, Loeb, right?

A Right.

Q " -- in its sole discretion -- ", meaning Newburger, Loeb's sole discretion, right?

A As of today, yes.

Q " -- failed to sell respondent's 11,300 shares of Westec stock on its resumption of trading", right?

A Right.

Q So that you read the set off and counterclaim so carefully that you thought that Buckley's statement that Newburger, Loeb failed to sell the stock in May of 1969, in fact meant -- to sell it in its own discretion in May of 1969 -- in fact meant that between 1962 and 1966 Jordan was running a discretionary account for

Buckley; is that right?

A Approximately. I read it and I thought that the account had also been a discretionary account and I thought that is what they were pleading.

Q You read it very fast; didn't you?

A I read rather fast.

Q Reading it back, wouldn't you agree with me that no sensible reading of this document could lead to that mistake?

A No. I agree with you I made a mistake. I don't think that no sensible reading --

Q You think I am going too far?

MR. SHAW: Objection, your Honor.

THE COURT: Yes, I will obstain that objection.

Q The fact of the matter is that it was your idea and you idea alone; you originated the idea -- to take an assignment of the Buckley claim to use against Gross?

MR. SHAW: Objection.

THE COURT: What is the objection based upon?

MR. SHAW: It contains three questions; that he took it, took it alone, in which case there is no conspiracy that he originated the idea and then to use against Gross.

THE COURT: Let me hear the question, please.

(Question read)

THE COURT: Overruled. You may answer, sir.

A It is my recollection that the subject of the assignment arose in a telephone conversation with Mr. Berkowitz in which we discussed the dollar settlement. I think that he suggested it and I quickly acquiesced, that I would ask Webster, Sheffield whether that could be part of the settlement.

Q I am going to read from your testimony on deposition, taken on June 3, 1971, page 76, beginning on line 25 and going through page 77, line 11.

MR. GRUTMAN: Just a moment, please.

(Pause)

MR. MANDEL: I quote:

"Q Did Ryan suggest the idea that Buckley would transfer his claim to Newburger, Loeb as part of the settlement?

"A No.

"Q Did Cook suggest that?

"A No.

"Q Did you mention that at the time of your first meeting with Cook and Ryan?

"A No.

"Q Did you originate the idea?

A Yes."

Q Mr. Persky, were those the questions and your answers?

A Yes.

Q Were you lying then or are you lying now?

MR. GRUTMAN: That is sinister, please, your Honor.

THE COURT: I sustain the objection of form.

Q After you arranged to get an assignment, you also insisted that the assignment clause or agreement have a clause saying that the Buckleys must cooperate in the prosecution of this claim or their release would become invalid? That is true, isn't it?

A Yes.

Q Before you made the Buckley settlement and after you made the Buckley settlement, you had discussions with various people about using that claim in the negotiations with Gross; did you not?

A I don't remember whether before -- certainly afterwards.

MR. GRUTMAN: Page, please? Page 110, Mr. Mandel?

MR. MANDEL: I will give you the page. Page 115, starting at line 20 to page 117, line 22.

Q Did I ask you these questions and did you give these answers, Mr. Persky? I quote:

"Q Were there discussions between you and anybody else as to whether the Buckley claim could be used to advantage in negotiating with Gross?

MR. GELB: -- "

MR. GRUTMAN: Please do not read the colloquy.

THE COURT: Well, let me see it.

What is the basis to your objection to that colloquy?

MR. GRUTMAN: I understand it also to be improper to read statements by lawyers. All that is evidence is the question by the questioner and the answer by the witness.

THE COURT: In this case Mr. Gelb was focusing the scope of the answer by reason of his colloquy.

The objection is overruled. In this instance, you may read the colloquy.

MR. MANDEL: Thank you, your Honor.

THE COURT: In some cases it would be improper, but in this case I deem it to be proper.

Q Going back, I quote:

"Q Were there discussions between you and anybody else as to whether the Buckley claim could be used to advantage in negotiating with Gross?"

MR. MANDEL: Mr. Gelb was the attorney representing you there.

THE WITNESS: Yes.

MR. MANDEL: Again, I quote:

"MR. GELB: You mean before it was obtained?

"MR. MANDEL: Before it was obtained or after it was obtained.

"A Before it was obtained and after it was obtained, yes. At one point I distinctly remember you being present when I discussed that.

"Q When?

"A It was a meeting at Golenbock and Barell.

"Q That was afterwards?

"A That was afterwards.

"Q And that was about the end of January; is that correct?

"A Probably you are right and, of course, as --

"Q What did you say at that time?

"A We were discussing, you and I, Mr. Gross's position, what he should be entitled to and I think Mr. culpability -- "

MR. MANDEL: That's obviously some kind of reporter's mistake, right?

THE WITNESS: Yes.

MR. MANDEL: I continue:

"A -- and Mr. Steefel were trying to make you understand that he could not shut his eyes to the blame and culpability that other people thought he had, and here was more evidence of the fact, something he could see hard and fast, the assignment of his claim.

"Q In other words, you were making the point, at least then, in late January, that if Gross did not consent to a deal and demanded his capital in full that, among other set offs that might be urged against him, would be the Buckley claim -- "

MR. MANDEL: And then I am skipping some colloquy between counsel, and I come back to an answer. I quote:

"A Mr. Mandel, we were engaged in a good-faith negotiation with you and everyone else in that room, trying to reach a meeting of the minds and one of the factors in that negotiation was the role played by Mr. Gross in the discussion of the firm and one of the problems that we had in reaching you and your client was your client seemed to disregard the reality of the situation and we were trying to make something real to him.

"Q You felt the Buckley claim would seem real to him in that contention -- "

MR. MANDEL: And may we agree that it should have been "in that connection"? The question was, "You felt the Buckley claim would seem real to him in that connection?".

THE WITNESS: Yes.

MR. MANDEL: To which you answered "yes."

BY MR. MANDEL:

Q Now, do you recall that you discussed the use of the Buckley claim in the negotiations with Gross both before and after you settled the Buckley claim?

A I am trying to remember when before I discussed it and I don't have today a recollection of it, but --

Q But in 1971, which was closer to the event, you had a recollection of it?

A Yes.

Q And you now believe that recollection to be true; is that correct?

A I would think that would be more accurate.

Q You discussed what number of people including

Risher, Kayne, Muh and Berkowitz and others, the effect of the Buckley settlement on Charles Gross's position and Charles Gross was then continuous source of discussion amongst these people? Is that right or wrong?

MR. GLATZER: Your Honor, I object to the form of the question.

THE COURT: Objection sustained.

Q You discussed the effect of the Buckley settlement on the position of Gross and Donoghue and Bleich with Risher, Kayne, Muh, Larry Berkowitz on witnesses and counsel for almost all of the Participants in the deal, as well as with Mr. Mandel; is that right?

A Correct.

Q And you were saying in those discussions that you now had something concrete to use against Charles Gross if he wanted to insist on getting his capital, or some of it, or liquidating; is that right?

A No, I think what I was saying is that I had something removed from the problems between the partners and Mr. Gross,and the subordinated lenders and Mr. Gross, and the limited partners and Mr. Gross, a claim of the third party -- the Buckley's -- analyzed by another law firm that might seem on its face to you and to your client to be less charged with emotion and therefore more objective in your analysis of the situation.

Q I am going to read from your deposition, Mr. Persky, page 106, line 19 to page 107, line 8 --

MR. GRUTMAN: Why don't you read 110?

THE COURT: Mr. Grutman, please.

Go ahead, Mr. Mandel; you proceed.

MR. MANDEL: I quote:

"Q We are talking about discussions of the effect of the Buckley settlement on the capital accounts of Gross, Donoghue and Bleich, right?

"A Right. There came a time when it was clear, or reasonably clear, that Donoghue, Bleich and Gross were not going to be participants in the transfer agreement and at various times people would say, 'What's the bottom line with Charlie Gross, if we have to fight with him and Mabel and Jeanne Donoghue?'.

"In that context we started doing additions and subtractions to what he claimed was good capital, what the accounts showed as good capital, diminished by those claims which the partnership had against Mr. Gross, against Mabel Bleich, against Jeanne Donoghue."

BY MR. MANDEL:

Q Did I ask that question and did you give that answer?

A Yes.

Q Going back to your negotiations with Buckley's lawyers, isn't it true that you struck the best deal you could with them and thought you were at the end of the line before you made the suggestion that they throw in an assignment of the Buckley claim against Gross -- of a Buckley claim against Gross, I should say?

A I think we were still asking for more money at that time.

Q I am going to page 109 of your deposition and I am starting on line 6. Did I ask you this question -- I am sorry, I am in the wrong spot.

I am going to page 117. Did I ask you this question --

MR. GRUTMAN: Line, please?

MR. MANDEL: Line 23. It goes to page 118, line 14. And I quote:

"Q How much money did the partnership give up in the settlement with Buckley in order to get an assignment of the claim instead of just a release?

"A In the notations. the assignment was asked for after we had reached a number. So we gave up nothing. It was a plus factor at that point.

"Q In other words, it did not matter to Buckley one bit whether he released Gross or assigned the claim to you -- "

MR. MANDEL: And I am skipping some colloquy between counsel and going to your answer.

"A I have no idea of what the operation of his mind was, but I know that after the 50,000 number, and that seemed to me to be the top, I then threw in the request for assignment and I got it without any difficulty and no one said, 'Take 45 or 40.'"

BY MR. MANDEL:

Q Did I ask those questions and did you give those answers?

A Yes.

Q And doesn't that mean that after you reached the top figure you asked them to throw in an extra -- an assigment of a claim against Gross, and they said, "Sure."?

A Yes, that's approximately right.

Q Well, it is entirely right; isn't it?

A Well, they never went above 50. It was my recollection that I had asked for more in a subsequent conversation, sort of realizing I wasn't going to get it; but your are right in saying we got the assignment without difficulty above their top number, which was 50.

That part is absolutely right.

Q Just thrown in as an extra and you said, "How about it?" and they said, "Sure."

MR. GRUTMAN: I object to that as argumentative.

THE COURT: Sustained.

Q At least this is true: They never suggested to you that the claim against Gross was of value, so that you should change the figures or do something better for them if they were giving you that additional asset, as you called it.

A They asked for nothing in exchange; you are right.

Q It was the partnership that got the assignment of this asset? You said yesterday it was an asset, right?

A Yes.

Q You regarded it as a valuable asset, right?

A Yes.

Q It was the partnership that got this valuable asset from the Buckleys as an extra, right?

A Yes.

Q And then the partnership, in turn, transferred this valuable asset to the corporation, right?

A Correct.

Q But the partnership did not get anything extra for that asset either, that was also thrown in, right?

A Wrong. It was part of the package. We took assets; we took liabilities.

Q The package was fixed before this came in as an extra. I am going to read to you from your deposition, Mr. Persky, page 109, lines 6 to 9. I quote:

"Q Did the settlement of the Buckley claim in any way change the price that the partnership got from the corporation for the transfer of all of its assets?

"A No."

BY MR. MANDEL:

Q Did I ask you that question and did you give that answer?

A Yes, but it is not the same question and answer.

Q What is not? Are you telling me I am not reading the transcript correctly?

A I am saying what we are talking about today in Court is a little bit different than the thrust of that question.

Q I am asking you again, Mr. Persky, did I ask you on June 3, 1971 --

MR. SHAW: Objection, your Honor.

MR. GRUTMAN: We have had it, Judge. He understands it.

THE COURT: That objection is sustained. It is a question of what Mr. Persky understood your earlier question to mean.

Q What did you understand my earlier question to mean?

A I thought you were asking me today whether there was a separate price negotiated for each asset that the corporation was to get, and my response was no; it was a package deal; they took all the enumerated assets and all the enumerated liabilities and, as we negotiated and people went through the records, they would find additional enumerated liabilities and assets; and, in fact, in one of the last hourly meetings, one of the general partner's counsel came up with the thought that perhaps we might have missed some that were reflected on the books; and there is a clause in here that says anything reflected on the books of the partnership is counted as an enumerated liability. So, that kept changing.

Q The fact of the matter is, no matter how you understood my question, and whatever you are saying, is that there was a package deal for the sale of the partnership assets and this Buckley asset, which arose on December 31 --

MR. GRUTMAN: December 17, if you please.

MR. MANDEL: No; it was signed on December 30 or 31.

MR. GRUTMAN: The case was settled and the document in evidence is the 17th.

THE COURT: Mr. Grutman, you are not on the stand.

MR. GRUTMAN: I think my objection is a sound one, your Honor.

THE COURT: If the witness does not adopt the question, he can deal with it.

Q Nothing extra was paid for the partnership because it now had the Buckley settlement amongst its assets? That's correct; isn't it?

A I will accept your statement that nothing separate was paid.

Q Nothing extra was paid?

A Nothing was enumerated extras. There were no extras; it was a package.

Q It was thrown into the package without any change of the price?

A As were additional liabilities, from time to time.

Q In investigating the Buckley matter, it never occured to you to ask Charles Gross for his version of the events before you made the settlement; did it?

A I did not talk to Charles Gross before the settlement.

Q And you did not inform Mr. Silverman or Jeanne Donoghue that you were negotiating this settlement which might effect them; is that correct?

A I don't know whether Mr. Silverman was present at any of the meetings where the settlement was discussed. I never talked in my whole life to Mrs. Donoghue, and I don't think I ever talked in my whole life to Mrs. Bleich. The first time I have seen Mrs. Bleich or Mrs. Donoghue was in Court.

Q You knew in December Mr. Silverman was representing Donoghue and Bleich, right?

A Yes.

Q And you did not discuss the Buckley settlement with him until after you consumated it?

A I really don't remember.

Q You don't remember one way or the other?

A No.

Q I go to page 84 of your deposition and I start at line 21 and I ask you if I asked you this question. And I quote:

"Q Did you tell Charles Gross or Mabel Bleich or Jeanne Donoghue or their attorneys or anybody else on their behalf of this settlement you were working out?

"A Not at that time."

BY MR. MANDEL:

Q Does that refresh your recollection?

MR. SHAW: Objection, your Honor. There is no indication on the witness's part that he needs his recollection refreshed. The question is, "Did you give that answer to that question?".

THE COURT: Well, were you asked that question and did you give that answer?

THE WITNESS: Yes, your Honor. I am trying to refresh my recollection by reading the next page.

THE COURT: Go ahead, Mr. Mandel.

MR. MANDEL: Then I said to you, and I quote:

"Q When did you first tell any of them -- "

MR. GRUTMAN: What page and line?

MR. MANDEL: Page 84. I quote:

"Q When did you first tell any of them of the settlement?"

MR. MANDEL: I am skipping colloquy and I go to your answer:

"A I don't remember when I first told them; it may be at a conference with you -- "

MR. MANDEL: And that means Mr. Mandel, right?

THE WITNESS: Right.

MR. MANDEL: I go on:

"A -- or it may have been in a telephone conversation with Arthur Silverman at Golenbock & Bareli.

"Q At what time?

"A In December or January of 1971.

"Q Before or after settlement was consumated?

A I would have to guess; I really don't remember. Maybe you can help me. When did I first meet you?"

MR. MANDEL: And I then said, "I don't know", but I think we can now agree it was January 15th?

THE WITNESS: Yes.

MR. MANDEL: I will continue:

"A If the meeting at your office was in January, it was after the settlement. If it was in December, it was before the settlement."

BY MR. MANDEL:

Q Did you give those answers?

A Correct.

Q So that it is now your present testimony that the first time you revealed to Gross or Bleich or Muh or their representatives that this settlement had been made was on January 15th, when you came to Mr. Mandel's office; is that correct?

MR. GRUTMAN: I object to the form of the question, "It is now your present testimony", suggesting his testimony has been otherwise.

THE COURT: Overruled. Present recollection.

A My present recollection as to Mr. Mandel is, as you said it; I placed it at that first meeting, which you tell me is January 15th. I said in 1971, "I have to guess; I really don't remember as to Mr. Silverman.", and I still don't remember as to Mr. Silverman, but you have helped me with yourself.

Q Do you recall, and calling to your attention Defendant's Exhibit X, which is the complaint you drew on behalf of the partnership, dated February 4th -- do you recall attending a large meeting on February 5th, 1971, at Golenbock & Barell?

A I remember a large meeting. I don't remember that it was February 5th.

Q Will it refresh your recollection if I suggest to you that you attended two such meetings, one on February 5th and one on February 8th, both at Golenbock & Barell, just a few days before the closing on February 11th, all in 1971?

A That there were two meetings, yes; but the dates really don't help. I am not saying you are wrong on the dates; I am just saying I don't remember the dates.

Q Do you recall at the first of those meetings taking this complaint up with Finley, Kumble and Golenbock, drawn on behalf of the partnership, and giving it to Arthur Silverman, and saying to him, "If this deal goes through without Charlie and Mabel, you don't think they will get their money, do you?"?

A I remember giving it to either him or you or both. I remember it being passed around the table and I remember myself and the other people saying to you and to Mr. Silverman that there are claims and cross-claims here and that it would be in everyone's best interests to try to reach a settlement without litigation.

Q Do you deny that you gave Exhibit X to Mr. Silverman and said to him, "If this deal goes through without Charlie and Mabel, you don't think they will get their money, do you?"?

A I don't remember saying the second part. I remember giving it to one or both of you.

Q My question is: do you deny that you said that, in substance, to Mr. Silverman?

A I am telling you I don't remember saying that.

Q There came a time, did there not, when you made a determination actually to bring an action on behalf of the corporation against Charles Gross and Gross & Company based on the Buckley churning claim?

MR. GRUTMAN: Objection. The prior testimony is that it was on the authority of the corporation that the law suit was commenced and the question suggests it was on his initiative. It has been asked before, your Honor.

THE COURT: I will sustain the objection as to form.

Q There came a time when a decision was reached that your law firm, Finley, Kumble, would actually start an action in this Court based on the Buckley claim against the defendants?

A Correct.

Q And about when was that decision reached?

A Sometime after the closing of February 11th.

Q Was the likelihood of that action discussed before the closing between you and anybody else?

A There was always a scintilla of hope, up to the very last minute, that everyone would agree to go along with the transaction. There was no decision made prior to the closing or discussions about bringing the action because we always had the hope that the problems would be resolved.

Q I don't think you quite answered by question, Mr. Persky. My question was this: were there discussions before the closing about bringing the action to hold off the claims for return of capital if Charles and Mabel and Jeanne did not go through with the deal?

A I don't remember discussions prior to the closing that reached any decision.

Q Were there discussions that did not reach a decision about that?

A During the negotiations, when you were present in the room, the position was made very clear that, if people were going to square off and not resolve their differences, that it was not going to be a one-sided fight.

Q I am asking about discussions where I was not present and where Arthur Silverman was not present and where Gross and Bleich and Donoghue were not present and you were meeting with your clients or meeting with other people who were participants in the deal, and I am asking whether there were not discussions about what would you do about bringing suit if Charles and Jeanne and Mabel did not go along with the deal?

A If such conversations took place, I have no present recollection of them.

Q Before the closing, you had discussions with Fred Kayne about his starting actions in California against Charles Gross; did you not?

A I think he told me that he was going to commence an action.

Q And that was before the closing?

A I can't today place when he told me, but he did tell me in some approximate time to the closing, January or February.

Q He told you he was going to do it before he brought the action; didn't he?

MR. SHAW: Objection, your Honor. We are now off the churning claim into some unrelated action, and I respectfully submit it is improper to get into this at this point. Mr. Persky is an attorney in

New York and this can come in in relation to Mr. Persky's main claim against the additional defendants on this alleged conspiracy.

THE COURT: I am not prepared to say it does not; so at this point I will overrule the objection.

Q You and Kayne had had discussions about Kayne starting actions against Gross in California before the closing?

A If you want to go back all the way to September, when I met him, he was hopping mad and claimed that Charlie had misled him and he was going to sue him. If that is the conversation you are talking about, that I remember; but when Fred started that action, I don't know and I don't remember. I did know before he started it, but I can't place for you whether that was before or after February 11th.

Q I will try to help you, Mr. Persky; I will indeed. I will show you Mr. Kayne's piece of paper.

MR. GRUTMAN: Your Honor, I fail to see the relevance of this, in also Mr. Persky represented Mr. Kayne, or Finley, Kumble represented Mr. Kayne, in the law suit to which counsel is now making reference; and I don't believe either of those propositions are correct.

THE COURT: Mr. Mandel indicates there is another purpose to this.

MR. SHAW: There should be a representation by Mr. Mandel that this fits into the overall conspiracy, all defendants are a party to a conspiracy that includes this, bringing another claim against Mr. Gross. It is going to open up another major issue.

THE COURT: Let's go some distance here and see what happens. Overruled.

MR. MANDEL: Your Honor, at the moment we have not been able to lay our hands on the Kayne California complaint.

Q Will you accept my representation that the Kayne complaint was dated February 3rd, in California?

MR. SHAW: 1970?

MR. MANDEL: 1971.

Q Were you aware, from your conversations with Kayne, that he was about to start that action before he started it?

A Yes. My testimony is whatever date he started it on, I knew before. All I am saying to you is I don't know the date.

Q Will you give me the substance of the conversation between you and Kayne in which he told you he was about to sue Charles Gross in California?

A All I can remember is he told me he had retained counsel and that he was going to start an action against Charlie Gross, arising out of Mr. Gross's misrepresentations to him in inducing him to join the Newburger, Loeb partnership.

Q Was the question of the transfer agreement mentioned in that conversation?

MR. GRUTMAN: Your Honor, I am going to object on the grounds that the only possible pleading in this case to which this could have reference would be paragraph 64 of the fourth counterclaim asserted on behalf of Gross, Bleich and Donoghue. There is no reference to this California litigation in which Mr. Persky was not a counsel, nor was Finley. I fail to see how it can be dragged in by its heels into this case at this point.

THE COURT: Mr. Mandel, will you respond to that?

MR. MANDEL: Yes. It is evidence of the conspiracy to use wrongful pressure on Gross to give up his partnership rights.

THE COURT: The objection is overruled.

THE WITNESS: Can I have the question read back?

MR. MANDEL: Yes.

(Question read)

A I don't have a independent recollection, but I couldn't imagine that I talked to Fred Kayne, if it was before the transfer agreement, without him asking where we were, what was the status of everything. So, I would assume, as part of that conversation he asked me , "Where are we?".

Q And it is true, is it not, that on February 2nd you had decided to give up the transfer agreement entirely because Miss Bleich would not go along with it?

A Not I had, but there was a decision made, and I don't remember whether it was the subordinated lenders or general partners or limited partners, but a combination of people said, "We are not going to go along unless everyone goes along."

MR. MANDEL: I offer Defendant's Exhibit S.

(Pause)

MR. GRUTMAN: Your Honor, I don't believe this is the entire document. My recollection is there is a second page showing to whom the document went. Could we have that?

MR. MANDEL: This is all I have.

MR. GRUTMAN: No, no, Mr. Mandel, that is not correct. We will get a complete copy.

MR. MANDEL: I would prefer that.

THE COURT: I take it there is no objection to this when you put together with it the direction list that was the second page?

MR. GRUTMAN: It may be a direction list or another letter which went contemporaneously with it.

THE COURT: In order to save time here, I will admit the single sheet Exhibit S in evidence and you may supplement it with anything your discovery determines copied it.

(Defendant's Exhibit S for identification received in evidence) xxx

MR. GRUTMAN: It is my recollection that there was a letter from Robert Newburger which went with a series of addresses which copied this by-hand delivery.

Do you recall that, Mr. Mandel?

MR. MANDEL: There was a letter from Mr. Newburger. I don't know if it copied this or not. I am personally happy to put that in evidence, too, but I am concerned with this letter at this moment.

THE COURT: Please, go forward with your

question, sir.

MR. MANDEL: I would like to read Exhibit S to the jury.

THE COURT: You may.

(Mr. Mandel reads to jury from Defendant's Exhibit S in evidence)

BY MR. MANDEL:

Q Did you send that letter?

A Yes.

Q Over your signature?

A Yes.

Q To whom did you send it?

A To my recollection, it was to everyone on the direction list.

Q Did you send it in good faith?

A On February 2nd, that was the state of facts.

Q Was that what you told Fred Kayne? You remember you told us Fred Kayne asked for the state of facts?

A If I spoke to him on February 1st, because we have not determined when, the deal was on. On February 2nd, it looked like it was off. By February 5th, which is the date you give me, where we met at Golenbock & Barell, the deal was on again. If you tell me exactly when I spoke to Fred Kayne, I could take a guess as to whether I told him the deal was on or off.

Q The fact is that you sent this letter saying the deal would not go through without Jeanne and Mabel, and you sent it by hand on February 2nd, right?

A Yes.

Q And the deadline went by without any action from them; did it not?

A Right, except that you agreed to come to a meeting, which you did, on the 5th.

Q When was that agreement made, at whose request?

A I don't know who set up the meeting, but you were present and it was at Golenbock & Barell's office, and I would assume it was set up by either you or Golenbock & Barell.

Q When the deadline went by, then you asked for a meeting; is that right?

A I don't remember who initiated the meeting or whether it was initiated before the deadline or after. All I know is one of those days the deal was off and then we were back on a negotiating pattern again a few days later.

Q What happened between February 2nd and

February 11th to change your mind about the rights of Bleich and Donoghue?

THE WITNESS: I am sorry, I don't understand the question.

Q Exhibit S says the deal will not go through without Bleich and Donoghue, right?

THE WITNESS: Okay, I understand the question.

Q Answer my question; right?

A That is what it says.

Q On February 11th, you nevertheless put the deal through without Bleich and Donoghue, right?

A Understood.

Q Right?

A Right.

THE COURT: Yes, he says so.

MR. MANDEL: "Understood" is not the same as "right."

A Do you want me to answer the question now, which I think I understand? You are misinterpreting the import of the letter. The letter was sent because at that moment in time it wasn't the law -- the limited partnership law -- or the New York Stock Exhange which had backed off from the position that it was all or none, but it was the other general partners, the subordinated lenders and limited partners who said, if anyone is going to get their money out in cash and leave them hanging and extending their claims, "We won't go forward.". And it was for that reason, because of their position, not any principle of law, that the deal seemed to be off on the date of that letter.

Q And between February 2nd and February 11th what changed that principle that these people wouldn't go ahead and Jeanne and Mabel and Charlie would get their money -- what changed that?

A I can not speak for everyone's state of mind, but it would appear that they determined that liquidation was a less-preferable solution than taking the chance some people would get their money out ahead of other people, including possibly Mr. Gross.

Q I suggest to you that between February 2nd and February 11th you told all of those people, "Charlie and Jeanne won't get their money, and Mabel, because we will bring this action against them promptly." True or false?

A False.

Q There was never any such discussion?

A Mr. Mandel, the general partners, limited partners and subordinated lenders and their attorneys were ready to sue Mr. Gross from the first moment we met with them --

MR. MANDEL: I object to that.

A -- and why need to raise any claims.

THE COURT: That is not responsive. Strike it out.

Q The fact is, no matter what you say the claims were, nobody ever sued Gross except your corporate client and the firm of Finley, Kumble, right?

MR. GRUTMAN: I don't know that that is so. The Finley, Kumble law firm never sued him; they acted as lawyers; and I ask your Honor to tell this lawyer that that maladroit question is not by dissent but by design.

Q The fact is that to this day, eliminating Fred Kayne, none of Mr. Gross's partners in Newburger, Loeb and Company have ever sued him for anything.

MR. SHAW: Objection, your Honor. That is not relevant.

THE COURT: No, overruled.

A I think there were some other partners to the California suit, as plaintiffs -- I am not sure about that.

Aren't some of the counterclaims in this case, or crossclaims, against Mr. Gross on behalf of the partnership?

Q No, sir, they are on behalf of the corporation only.

MR. MANDEL: Do you concede that?

MR. GRUTMAN: No, I don't. I don't wish to get embroiled into a discussion about my position, your Honor. There is a witness on the stand and I am not the witness.

THE COURT: Mr. Grutman, this answer was very easy. We just look at the caption.

MR. GRUTMAN: By operation of the law, the partnership may become a direct beneficiary of successful litigation on these claims, including the claim against Gross and Company.

MR. MANDEL: This is all nonsense.

MR. GRUTMAN: That is not a legal statement, your Honor.

MR. MANDEL: Yes, it is. It is a statement of fact.

THE COURT: I would appreciate, gentlemen, if we could avoid these discussions on the floor.

Who has a copy of the full caption on the answer and counterclaims and reply of plaintiff?

MR. MANDEL: It is only a question of the reply, your Honor.

THE COURT: Mr. Esterman, do you have a copy of the reply with a full caption?

MR. ESTERMAN: I have the amended answer and counterclaim.

MR. MANDEL: No, no; it is a question of the reply, with these additional claims.

(Handing)

THE COURT: The reply does not have the names in the caption.

MR. MANDEL: The reply states on whose behalf it is made.

THE COURT: Can we get a stipulation here other than asking Mr. Persky to examine this?

MR. MANDEL: I stated the facts but Mr. Grutman won't stipulate.

MR. GRUTMAN: I will stipulate to anything I can, but I am not prepared to at this time.

THE COURT: We will recess for lunch until 2:00 o'clock, and why don't you reach agreement on who the parties are in the third pleading?

MR. GRUTMAN: That is not what I understood, your Honor.

THE COURT: The question was whether any of these other people other than Mr. Kayne and the corporation ever brought suit against Mr. Gross; is that right?

MR. MANDEL: And then Mr. Persky suggested that the counterclaims were brought by the partnership, and I said no.

THE COURT: He raised that as a question.

THE WITNESS: I am sorry; I was inartful. I meant there were partnership claims asserted.

MR. GRUTMAN: That is precisely the point I am stating, and if that is the way the record can stand, we don't need to research it.

MR. MANDEL: That is not responsive to my question. My question is nobody has sued here except the corporation and the partnership,and the partners have not; and that is the fact.

THE COURT: Is there a question about that?

MR. GRUTMAN: The named party is the corporation asserting claims deriving from the partnership, and nobody else could bring it.

THE COURT: We will stand in recess, ladies and gentlemen, until 2:00 o'clock.

(Luncheon recess)

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AFTERNOON SESSION

2:00 p.m.

(Jury present)

ROBERT S. PERSKY, resumed.

CROSS EXAMINATION (continued)

BY MR. MANDEL:

Q Mr. Persky, we were talking before the recess about certain claims which had been asserted in the reply by the Newburger, Loeb Corporation.

Do you agree with that statement?

A Yes. These were the partnership claims assigned to the corporation.

Q And no matter when these claims arose, the partners and the partnership themselves did not assert the claims against Mr. Gross; it was the corporation that did it, right?

A In litigation, yes.

Q Those did not come in at the start of the litigation, which was in 1971, but in December 1973; is that correct?

A I can agree with you they came in later, but I don't know the date.

Q All right, but it is a matter of record; is that correct?

A If that is what the record shows, yes.

Q And December of 1973 -- did you have anything to do with deciding to assert these new claims against Mr. Gross?

A By December of 1973 I don't think I had anything to do with the litigation.

Q You were no longer associated with Finley, Kumble?

A No, there was a period where I worked with Mr. Gelb and Mr. Roth in this case and then there was a period when the litigation department took over completely and I was totally peripheral. In December I was still at the firm, but not involved in the active day-to-day work on the case.

Q Do you remember that about the time that the transfer deal was pending, you asked Ned Frank three or four times to get up a list of all the possible claims and grievances against Charles Gross?

A Correct.

Q You asked him first to do it and when it did not happen; you reminded him for a second time and, when it did not happen, you reminded him again; and finally you got a letter out of Ned Frank that way; is that right?

A Again, you are not stating exactly what happened. Ned and the other people would start to verbalize them and I kept saying, "Give us a list we can work from, eliminating the good ones, taking the bad ones out.", something in writing --

Q You were looking for ammunition against --

MR. SHAW: Could the witness finish his answer, your Honor?

THE COURT: Yes.

Q Did you finish?

A I don't know what my last word was, because you interrupted.

MR. MANDEL: Excuse me. Finish your answer.

THE WITNESS: Read back my last words, please.

THE COURT: I think it was"eliminate some," and so on.

A And then proceed to interview the partners, limited partners and subordinated claims, to see what justification there was for the claims.

Q You were looking for ammunition against Charles Gross?

A If you want to say an off set was ammunition, yes.

Q Before the transfer agreement, you were looking for ammunition against Gross?

A At every meeting we had, from the beginning, people made complaints about Charlie Gross and I wanted them reduced to writing, yes.

Q And you wanted ammunition to use against Gross, right?

MR. SHAW: Objection, your Honor.

THE COURT: No, overruled.

A "Ammunition" is your word. In my mind it was counterclaims and off sets.

Q So that if he did not go along with the deal, you would have a way of still not paying him; is that correct?

A So that if he did not go along with the deal and we had litigation, we would be able to assess our position vis a vis that litigation.

Q And whenever you could, you said to the partners, "What can you give me against Charles Gross?", in substance and effect.

A No, not whenever I could.

Q All right, on many occasions?

A Not even many occasions. At almost every meeting, spontaneously, these complaints arose against Charlie and what I asked, and I reason I picked on Ned Frank was because in addition to being a general partner, he was an attorney, and I thought he would be able to articulate these claims in a manner that I could understand best.

Q But until you came on the scene, nobody sued or talked about suing Gross on these deals?

MR. GRUTMAN: Objection.

MR. SHAW: How does he know what was said before he came on the scene?

THE COURT: To the extent he knows. Overruled.

A I don't know what was said before I came on the scene, but when I got there, they were talking about suing Charlie Gross.

Q The fact of the matter is that, while you were general counsel to the partnership, no action was started against Charles Gross on any count by the partnership?

A That is absolutely correct. We were negotiating the whole time with you.

Q No, that is not right. You never met me until January 15th.

A Well, Mr. Silverman, then, when he was representing Mr. Gross.

Q A lot of these so-called complaints and grievances were obviously nonsense to you; weren't they?

A No, not nonsense.

Q All right, what word would you use?

A Some of them were incapable of proof because of various reasons. Some of them were just claims that had no legal validity; although there might have been a disaffection with the action, it wasn't wrong.

Q You were aware, were you not, that none of the partners, except with the possible exception of your clients, Kayne and Sloane, had uttered these complaints to Gross or had made any threats to Gross about litigation?

A Absolutely wrong.

Q Wrong?

A Yes.

Q All right, which partners?

A Through their counsel, almost each and every partner at various times at these meetings we had, including the ones you attended and Mr. Silverman attended, said that their clients had claims against Mr. Gross and these claims were entirely different from that California litigation you talked about this morning.

Q I want you to list the clients, the lawyers and the claims which you have just broadbrushed.

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A The limited partners and the subordinated lenders, and I can not, without the direction list --

Q Subordinated lenders are not partners --

MR. SHAW: Objection, your Honor.

Q -- I am asking about partners who are not subordinated lenders.

A It is my recollection that people like the Roggenburgs, who had not been informed --

Q People like the Roggenburgs or the Roggenburgs?

A The Roggenburgs.

Q Their attorney said something?

A Yes.

Q Who was that?

A Mr. Tichtin, I believe, at that time.

Q When did he say it?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

MR. GRUTMAN: We are three questions away from the question that is unanswered.

THE COURT: Overruled.

A There is no way I can pinpoint at which of many meetings he said it.

Q What did he say?

A He said that he felt that his client had been defrauded, that his client had not been informed of the status of the financial condition of the partnership, that his client did not know about the trading account.

Q Who was the next lawyer with the next complaint?

A I don't know if they went in sequence.

Q All right; what was another one, a lawyer, a client, the time, the complaint?

A Mr. Steefel, at his office, the meetings, saying that he felt his clients had claims against Mr. Gross.

Q What were the claims?

A Mismanagement of the company, refusing to accede to the Atlas request to sell back the lease, the secret trading account, misinformation about the financial condition of the company.

Q Mr. Steefel said all these things?

A At one time or another he did, is my recollection.

Q At what meetings?

A I can not differentiate between the many meetings we had during this period.

Q Mr. Steefel is a trained lawyer, right?

A Yes.

Q He is a lot older than Ned Frank was, right?

A Correct.

Q And Steefel is alive and Ned Frank is now dead?

A That's right.

Q During those days did you ever ask Steefel for a particulars?

A Steefel was getting his information from people like Ned Frank who were in the partnership.

Q Mr. Steefel was representing partners, you told me, limited partners?

A Yes.

Q Did you ask Steefel for a bill of particulars?

A I asked the people who had first-hand knowledge or could get accesss to it; and Steefel did not. Steefel was being told things by partners and their attorneys --

Q What partners told Steefel?

A Mr. Frank --

Q You don't know?

MR. SHAW: Objection, your Honor.

THE COURT: You may answer.

Q Frank --

A Ned Frank sat at these meetings and said, "These are things which I think are valid claims against Mr. Gross."

Q Anybody else?

A I believe at one time Mr. Richenthal, on behalf of his client said he felt he had a claim against Mr. Gross.

Q Who was Mr. Richenthal's client.

A I don't remember which of the people he was representing.

Q What was his client's claim against Gross?

A They all had the same basic claims and all revolved around nondisclosure of the financial condition, secret trading account, purchase of the basketball team, the One New York Plaza lease, and there were others that were de minimis considering the amounts of money we were talking about.

Q Did you ask Mr. Richenthal for a bill of particulars or some information?

A Mr. Mandel, my answer is the same: Mr. Richenthal was getting the information from the same people we were getting the information from, people like Ned Frank, who were partners of the firm and active in the business. It would have added nothing for Mr. Richenthal to make a list of what Mr. Frank told him.

Q And all of these discussions were in the context of dealing with Charlie Gross if he wouldn't go along with the deal, right?

A All of them were in the context of dealing with Charlie Gross, period; what would happen in liquidation; what would happen in the deal procedure; what should be the amount of his capital account; what releases would be given; what would we be giving up, if we gave him a release. All these were questions that were talked about.

Q About how many discussions like that did you have with these people when you were gathering up --

A I can't begin to estimate the number of meetings we had in those three months.

Q Do you remember that Mr. Steefel's client was an estate?

A Yes.

Q Of Morris Newburger?

A Right.

Q Can we assume Mr. Steefel was not getting information from his client?

A That is what I told you; he was not getting information from his client; they were getting the information from the active partners in the firm.

Q Do you recall now that in August Kayne told all of the partners in your presence that they were all in violation, and that he had claims against all of them, and that you prepared language for him saying that he is not giving up his claims against any of the partners?

MR. SHAW: Objection, your Honor. It seems to me the claims that might have been brought in good or bad faith against other persons, not Mr. Gross or Bleich or Donoghue, are totally irrelevant to this proceeding. Now we have expanded it to include the partners at large, claims being made against them.

THE COURT: Yes, but I think it is permissable to proceed along this line.

A If you are talking about the meeting I didn't remember yesterday, I still don't remember it.

Q But you don't deny that it occurred?

A No.

Q There came a time when you told everybody -- you told them -- that there were valid claims against Gross?

A I said there were claims against Gross.

Q You deny that you said at the meeting that you thought they were valid claims against Gross?

A I don't remember using the word "valid." I said there were claims against Gross.

Q Page 209 of your deposition, line 10, and I am going to line 25, and I quote:

"Q Did you tell any of the general partners or limited partners or subordinated lenders at any time prior to the closing about the existence of these claims against Mr. Gross and that you thought they were valid?

A I believe I did.

Q Can you recall whether you did this at the meeting or private discussions or both?

A I can not recall specific instances other than meeting with you at which other people were present.

Q Did you ever discuss at any meeting when Gross and his representatives were not present the question of asserting these claims against Gross after completion or consummation of the transfer amendment?

A I don't know whether I did or not."

BY MR. MANDEL:

Q Did I ask those questions and did you give those answers?

A Yes.

Q You know that all of these extra claims, other than the Buckley claim, were not asserted when Gross was sued in the first instance, right?

A Correct.

Q I would like to pass on to another thing.

Do you remember at any time before the closing hearing that Mr. Gross owned or claimed that he owned specific vested interest in the so-called in-kind securities, namely, some warrants of Geon and another company?

A Yes.

Q You remember hearing about that?

A Yes.

Q When did you hear about that?

A One time was at the Golenbock and Barell meeting with you. I don't remember whether I heard about it other times.

Q Which meeting was it with me? Was it the January 15th meeting?

A At the Golenbock-Barell office.

Q One of those meetings, on the 5th of February of the 8th of February?

A One of those meetings, or maybe both.

Q Who spoke about that? Did Mr. Mandel speak about it or did Mr. Gross speak about it?

A At one of those meetings, the one that stands out in my mind, Mr. Gross was not present, so I believe it was Mr. Mandel.

Q And Mr. Mandel said, "These securities belong to Charles Gross and they have a substantial value and, apart from everything else, they can not be transferred or sold to anybody else;" is that right?

A No. I think what you said was that as part of the settlement package we are talking about, Mr. Gross wanted his share of them as part of the package.

Q Do you remember an assertion that he had a vested interest in the securities?

A I think you used language substantially to that.

Q Did you ever hear of that before then in any way? Was this question of the vesting of these in-kind securities brought to your attention before the statements of Mr. Mandel at that meeting in February?

A I don't remember.

Q Did you ever do any research or look into that question to see whether under the transfer agreement which you were sponsoring securities belonging to Gross were being turned over to the corporation which was your client?

MR. SHAW: Objection to the use of the word "sponsoring."

THE COURT: Read the question, please.

(Question read)

THE COURT: Take out the word "sponsoring." Overruled. Go ahead.

A I don't think I did research. I think I must have spoken to Larry Berkowitz after you raised the issue.

Q And what happened?

A I was advised that these were partnership assets that had never been doctored.

Q Berkowitz told you that?

A I think it was Berkowitz. He was the one I normally would have talked to about that.

Q Can you recall a specific conversation with Berkowitz?

A No.

Q Can you recall anything specific about it?

A Not more than I have told you.

Q Can you recall having received mail about this at an earlier time?

A I may have; I may not have; I don't remember.

Q Can you recall any discussions with Fred Kayne about these in-kind securities?

A No.

Q Can you recall any discussions with Risher about these in-kind securities of Gross?

A No.

Q I would like to go now to your opinion letter in the closing on February 11th, and I will start with this:

When was the first time you heard from any source a claim that the transfer agreement could not legally be made without the consent of Gross, Bleich and Donoghue?

A I don't think I heard at any time that it could be made without the consent of Charlie Gross; I don't remember anyone taking that position.

Q How about Bleich and Donoghue?

A I am not certain whether that was one of your arguments or not. I don't know.

Q You don't know whether Mr. Mandel raised that question?

A I really don't remember. You could have.

Q Then that became a question to be answered by the Rosenman firm; is that right?

A I think it had to be answered by a large number of attorneys who were participating in the transfer action.

Q But an opinion letter was to come from the Rosenman firm?

A That was the original intent, yes.

Q And that was expressed in the preliminary agreement of December 30th; is that correct?

A I don't think the Rosenman firm was named. I think it was just an opinion of counsel.

Q Opinion of counsel for the partnership?

A Right.

Q Was it your testimony on direct examination that the first time you heard the Rosenman firm would refuse to give such an opinion was on February 11th, the night of the closing?

A That's correct.

Q It came to you as a bombshell, right?

A That's correct.

Q You are certain of that?

A That is my recollection, Mr. Mandel.

Q And it is your testimony that Mr. Burak did not tell you in advance that the Rosenman firm had researched that question and could not and would not give such an opinion?

A It is my recollection that Mr. Bamberger told me prior to the 11th that the Rosenman firm had researched the issue, could not find a case directly in point and had raised the question of Section 98, and that was when someone was assigned from Finley, Kumble to look into the issue, but there was no refusal or any communication to me personally that there would be a withholding of the opinion letter until the night of February 11th.

Q That came to you as a surprise, is your testimony, on February 11th?

A That's correct.

Q You came in there fully expecting that the Rosenman firm would give that opinion? That is your testimony?

A Not only did I come in there that way, but we got half through the end before that became apparent. One would have thought if that was their position from the beginning they would have gotten up and told the assembled attorneys, "People, before you start signing anything, we are not going to give an opinion tonight."

Q Not knowing yourself that the Rosenman firm would refuse to give the opinion, you did not notify any of the other participants that there could be that problem,